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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

LYNNE ABRAHAM,

Petitioner,

v.

MARTIN HARRIS, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court has the power to determine that a state official lacks a sufficient interest for intervention under Fed. R. Civ. P. 24(a)(2), where the state itself has specifically designated that official by statute to represent its undisputed interest in the litigation.

2. Whether a proposed intervener in a federal lawsuit must show that he could have been an original party to the suit, where Fed. R. Civ. P. 24(a)(2) provides only that an intervener show an "interest" in the litigation.

LIST OF PARTIES

The parties to the proceedings before this Court, including those parties recently substituted by the district court, are petitioner Lynne Abraham and respondents Martin Harris, Jesse Kithcart, Roy Cold, Delores Brown, James Dunyon, Ronald Glover, Walter Frydlewicz, Michael Mobely, Theodore Levine, Reverend Albert F. Campbell, Rosita Saze-Achilla, Genece E. Brinkley, Reverend Paul M. Washington, M. Mark Mendel, Donald J. Padova, J. Patrick Gallagher, Harry E. Moore, Wilhelmina Speach, Elsa Y. Legesse, Raymond E. Shipman, Honorable Edward G. Rendell, and the City of Philadelphia.

The parties to the proceedings before the Third Circuit Court of Appeals were appellant Lynne Abraham and appellees Martin Harris, Jesse Kithcart, Jonathan Lewis, Roy Cold, Carol Ransome, John Cummings, Raymond Whittington, Derrick Jones, Joan Reeves, Reverend Albert Campbell, Labora M. Bennett, James D. Barber, Allen M. Hornblum, M. Mark Mendel, Donald J. Padova, J. Patrick Gallagher, Willie Gray, Press Grooms, Harry Moore, James S. White, Honorable W. Wilson Goode, and the City of Philadelphia.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lynne Abraham, District Attorney of Philadelphia County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter. The opinion was filed on October 4, 1991, and rehearing was denied on October 31, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, for which review is sought, is reported at 946 F.2d 214 and is reprinted in the appendix, App. 1-40, *infra*.

The relevant memorandum decision of the United States District Court for the Eastern District of Pennsylvania (Shapiro, D. J.) is reprinted at App. 73-82. Earlier Third Circuit and District Court decisions, entered during the course of the litigation, are reported at 113 F.R.D. 615; 654 F. Supp. 1042; 654 F. Supp. 1057; 761 F. Supp. 382; 820 F.2d 592; 758 F.2d 83; 755 F.2d 338.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, plaintiff-respondents brought suit against defendant-respondents in the Eastern District of Pennsylvania. Petitioner subsequently sought to intervene as of right. The assigned District Court judge, the Honorable Norma L. Shapiro, denied this motion on January 14, 1991. App. 73-82. On March 11, 1991, Judge Shapiro approved a new consent decree. App. 83-86. Petitioner appealed to the Third Circuit pursuant to 28 U.S.C. § 1291. On October 4, 1991, a divided Third Circuit panel affirmed Judge Shapiro's order denying intervention (No. 91-1068) and dismissed petitioner's appeal from the March 11, 1991 consent decree (No. 91-1194). App. 1-40. On October 31, 1991, the full Third Circuit denied rehearing. App. 87-88.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, amendment ten, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

18 PA. CONS. STAT. § 1108 (1991), which provides:

> The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

STATEMENT OF THE CASE

The relevant procedural events in this case are set forth in detail in the opinion of the panel. App. 4-11. A brief summary of these events is as follows:

This petition arises out of a 42 U.S.C. § 1983 action filed by prisoners (plaintiff-respondents) against administrators of the Philadelphia Prisons (defendant-respondents). Although there has never been a trial or any finding of unconstitutionality, Philadelphia prison administrators sought to settle this case in August 1986 by a consent decree requiring the release of pretrial detainees. The District Attorney of Philadelphia immediately sought to intervene, pursuant to Fed. R. Civ. P. 24(a)(2), asserting, *inter alia*, that the prison administrators' agreement would harm the public safety and violate the state's pretrial detention laws and the state's statutory scheme for alleviating prison overcrowding. The District Court denied intervention and approved a consent decree.

The District Attorney appealed to the United States Court of Appeals for the Third Circuit, which affirmed the district court's order on the basis that the District Attorney lacked a "legal interest" for intervention as of right. *Harris v. Pernsley*, 820 F.2d 592 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987). The court declined to grant intervention because it believed that under state law the district attorney was not the "spokesperson" for Pennsylvania's interests in pretrial detention. *Id.* at 602. The court held that "[w]e must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials." *Id.*

Eighteen days after this Court denied certiorari, and in direct response to the Third Circuit's interpretation of state law, the Pennsylvania legislature redefined the District Attorney's role, explicitly making the District Attorney the spokesperson for the state's interests in enforcing pretrial detention orders. Following vigorous debate over whether the District Attorney should be permitted to intervene in the Philadelphia Prison litigation to challenge the legality of the local prison administrators' consent decree, the Pennsylvania House voted overwhelmingly to enact 18 PA. CONS. STAT. § 1108 (1991), which, when subsequently passed by the state senate and signed into law, overruled the Third Circuit's state law interpretation.[1] Specifically, § 1108 grants the District Attorney "automatic standing and a legal interest in any proceeding which may involve the release or non-admission of county prisoners," and grants the District Attorney the right to compel institutional custody of prisoners and detainees.

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[1] *See* Pennsylvania Legislative Journal-House, Nov. 24, 1987, at 1951; App. 92-93 (statement of Rep. Wogan, author of amendment) (discussing the Philadelphia prison litigation and stating that "our D.A.'s, who, it is already recognized, have the power . . . to represent the Commonwealth generally in challenges of the constitutionality of the State's penal statutes, should also have the authority to intervene in lawsuits involving the release of county prisoners"); *id.*; App. 94-95, (statement of Rep. Friend) (arguing that the Philadelphia District Attorney should be permitted to intervene to challenge the constitutionality of consent decree); *id.*; App. 95-97 (statement of Rep. Evans) (arguing that the Philadelphia District Attorney has sufficient input into litigation and should not be

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On May 27, 1988, three days after the enactment of § 1108, the District Attorney filed a motion to intervene pursuant to Fed. R. Civ. P. 24(a)(2) based on this new statute in order to raise the state's claim that the consent decree impermissibly violated state law, and would harm the public and the enforcement of the criminal laws. After declining to rule on the motion for two and one-half years, the district court denied it, ruling that the Pennsylvania legislature lacked the power to designate its representative in this litigation. App. 73-82. Soon thereafter, the district court approved a new consent decree, which permanently limited new admissions of pretrial detainees to the prison, and further required the release of 175 additional pretrial detainees per week.[2]

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authorized to intervene); *id.* at 1952; App. 99-100 (statement of Rep. Kozinski) (arguing that District Attorney should be allowed to intervene to assert public safety concerns raised by the consent decree); *id.* at 1955; App. 109-10 (statement of Rep. Fattah) (arguing that consent decree's provisions would not unduly threaten public safety and that the District Attorney should not be permitted to intervene). At the conclusion of the debate, the House voted overwhelmingly in favor of this amendment. *Id.* at 1955-56; App. 112-14 (amendment approved by vote of 175 to 22).

[2] The 1991 consent decree precludes the Philadelphia prisons from admitting pretrial detainees unless they are charged with "enumerated crimes," which are defined as murder, attempted murder, forcible rape, attempted rape, involuntary deviate sexual intercourse, corrupting the morals of a

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The District Attorney appealed the order denying intervention (3d Cir. No. 91-1068) and the order finally

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minor, arson, kidnapping, aggravated assault, a crime of violence committed or attempted with a firearm, knife or explosives, escape, domestic violence assaults, contempt, and witness intimidation. Crimes such as demand note bank robberies, burglaries, and car theft are not admittable offenses in Philadelphia.

As a result of this consent decree, the Philadelphia Prisons may no longer admit most accused drug dealers. Rather, these defendants must possess one of the following in order to gain admission: 50 pounds of marijuana ($100,000 street value), 50 grams of heroin ($75,000 street value), 50 grams of cocaine ($5,000 street value), 10 grams of cocaine base (crack), 50 grams of methamphetamine, 25 grams of amphetamine, or 200 tablets of methaqualone.

In addition, the Philadelphia Prisons may no longer admit defendants subject to an outstanding "bench warrant," issued for failing to appear at a prior court listing, unless the defendant has two or more bench warrants on separate misdemeanor or felony criminal charges. This bench warrant provision does not permit the initial admission of defendants who have repeatedly failed to appear for court on the same case. It also does not permit the admission of defendants with multiple bench warrants in summary offense cases.

See App. 83-86 (order finally approving consent agreement); App. 46-49, 63-65 (release/non-admission criteria of consent agreement).

The 1991 consent decree additionally requires the weekly release of 175 pretrial detainees from among those who *do* meet the narrow criteria set forth above. The categories of detainees who must be released under this additional provision are: (1)

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approving the consent decree (3d Cir. No. 91-1194). On October 4, 1991, however, the Third Circuit panel majority, over the vigorous dissent of Judge Aldisert, issued an opinion which treated § 1108 as a nullity. App. 1-26. The majority concluded that the Pennsylvania legislature could not designate the District Attorney as the state's "spokesperson" with the legal right to seek compliance with state law mandates concerning pretrial detention. Instead, the panel majority ruled that Pennsylvania could confer a "legal interest" sufficient for intervention *only* if it made the district attorney responsible for overseeing prison conditions. App. 21-22, 25. The panel found that unless the District Attorney could have been an original defendant in the litigation, in that she was liable for prison conditions, subject to injunctive relief, or subject to contempt, the District Attorney could not intervene. App. 21-22. The majority thus affirmed the denial of the District Attorney's motion to intervene, and dismissed the District Attorney's appeal from the new consent decree ordering the mass pretrial detainee releases. App. 26.

Judge Aldisert emphatically dissented, saying that he "totally disagree[d]" with the majority; that the legal

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any and all suspected drug dealers who were initially incarcerated because they possessed more than the various amounts of controlled substances specified above, (2) any and all defendants who were initially incarcerated because they refused to come to court more than the two failures to appear specified above, and (3) defendants who, due to changed circumstances, would be no longer admittable to the prison under the admissions criteria. App. 63-65, 46-49.

issue "is not even close"; that the Pennsylvania Legislature's enactment of § 1108 plainly granted the District Attorney a legal interest; that the district court's "fascinating" conclusion that the state legislature lacked the power under state law to grant a legal interest "flies beyond the outer limits of mere sophistry or fallacious reasoning and becomes a federal judicial fiat rendering a state statute null and void"; that the federal courts were bound to give "full force and effect" to this state statute; that the panel majority had flatly disregarded its duty "to respect the boundaries that the Commonwealth has chosen to draw as to responsibilities of its public officials"; and that in so doing the panel majority "cut jurisprudential corners" to endorse the district court's exercise of "naked judicial power" (Aldisert, J., dissenting, App. 26, 30, 35, 37, 38, 39).

The District Attorney filed a timely petition for rehearing *in banc*. On October 31, 1991, the Third Circuit Court denied this petition. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. A FEDERAL COURT DOES NOT HAVE THE POWER TO DETERMINE THAT A STATE OFFICIAL LACKS A SUFFICIENT INTEREST FOR INTERVENTION UNDER FED. R. CIV. P. 24(a)(2), WHERE THE STATE ITSELF HAS SPECIFICALLY DESIGNATED THAT OFFICIAL BY STATUTE TO REPRESENT ITS INTERESTS IN THE LITIGATION.

This case presents an issue going to the heart of federal/state relations: whether a federal court may

successfully exclude from prison litigation the very official designated by the state to represent its interests in such lawsuits. The lower courts, relying on the federal intervention rule, Fed. R. Civ. P. 24, have effectively allowed the plaintiffs' lawyers to designate as their opponents parties who would be amenable to their goal of prison releases, while excluding from the litigation the official who would, by authority of state statute, uphold the Commonwealth of Pennsylvania's interest in the lawful detention of persons charged with violating its criminal laws. This Court should grant review to consider whether Rule 24 permits the federal courts to reject a state statute as the rule of decision in favor of federal judicial decisionmaking.

Preliminarily, neither the lower courts nor the plaintiffs have attempted to dispute that the state – as opposed to the public official it designated – has an interest sufficient to justify intervention. Indeed, the state plainly has a stake in challenging the consent decree's large-scale prison releases. The detainees in question have been incarcerated as a result of lawful bail orders entered upon consideration of the risk of flight and threat to the public. Their release will result in failures to appear for trial and new crimes committed against the community. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (compelling state interest in preventing new crimes by defendants awaiting trial).

Moreover, the state is in a position to raise legal issues concerning the propriety of the consent decree that the existing parties obviously will not pursue. Primarily, the state may argue that, absent any findings of unconstitutionality, the district court could not enter a consent

decree that violated state law where the "consenting" defendants, local prison administrators, lacked the power to agree to state law violations.[3] Whether litigants may

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[3] Pennsylvania law clearly establishes that Philadelphia prison administrators lacked the power to agree to the release of pretrial detainees in violation of judicial committment orders. Philadelphia prison administrators are required to provide detention facilities for pretrial detainess committed by the Philadelphia criminal courts. *See* 61 PA. CONS. STAT. § 785 (1991) (requiring Philadelphia to commit to houses of detention "all persons awaiting trial on criminal charges who have been committed thereto by any judge or officer having the power to make commitments.") The Pennsylvania Supreme Court has explicitly held that political subdivisions such as Philadelphia have been delegated the duty to incarcerate pretrial detainees. *See County of Allegheny v. Commonwealth*, 490 A.2d 361, 377 (Pa. 1985) (holding that state must provide the political subdivision with the taxing power or appropriations necessary to discharge the political subdivision's "statutorially delegated duty to provide detention facilities"). *See also Jackson v. Hendrick*, 466 A.2d 226, 233 (Pa. 1983) (Nix, J. (now C.J.) dissenting) (discussing City's delegated duty to maintain housing for those charged with crimes).

While many other jurisdictions have enacted legislation permitting releases, Pennsylvania has not. *See generally Benjamin v. Malcolm*, 564 F. Supp. 668, 690 (S.D.N.Y. 1983) (referring to such legislation enacted in Michigan, Ohio, Connecticut, and Georgia, and proposed in New York). Instead, Pennsylvania's statutory scheme requires prison administrators to pursue alternatives for alleviating overcrowding. *See* 61 PA. CONS. STAT. §§ 72-76 (1991) (entitling prison administrators to petition the Department of Corrections of the Commonwealth of Pennsylvania to transfer inmates to alleviate overcrowding); 42 PA. CONS. STAT. § 9762(3) (1991) (authorizing transfer of sentenced prisoners); 61 PA. CONS. STAT. § 933 (1991) (same). Moreover, Philadelphia prison administrators have the power to compel state assistance if the number of detentioners overwhelms Philadelphia's financial resources. *See County of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985).

invoke the Supremacy Clause to override state law in such a manner is a significant legal issue that the state must be granted a legal forum to assert.[4] Under these circumstances, the state's interest in enforcing its pretrial detention laws certainly meets this Court's requirement of a "significantly protectable interest" for intervention as of right. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971).

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[4] *See Maryland v. United States*, 460 U.S. 1001, 1002 (1983) (Justice, now Chief Justice, Rehnquist, with whom Chief Justice Burger and Justice White joined, dissenting) ("I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a law suit, invokes the power of the Federal government to preempt state regulatory laws); *Bushey v. New York State Civil Service Comm'n*, 469 U.S. 117 (1985) (Chief Justice Burger, Justice, now Chief Justice, Rehnquist and Justice White, dissenting from denial of certiorari).

See also Bates v. Johnson, 901 F.2d 1424, 1426 (7th Cir. 1990) ("A state's right to make a fresh choice about domestic policy as political officials turn over may be an implied term in a consent decree, given the norm that public officials may not bind their successors. If as a matter of state law an official lacks the authority to commit the state to maintain a rule beyond his term in office, that official cannot accomplish through a consent decree what he has no power to accomplish"); *Leslsz v. Kavanaugh*, 807 F.2d 1243, 1253 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987) ("If as appellees argue a federal court may take almost any action 'consistent with' the 'spirit' of the applicable constitutional law and the decree itself, there is no limitation on the scope of the court's power"); *Kasper v. Board of Election Comm'r*, 814 F.2d 332, 340 (7th Cir. 1987) ("district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature"); *Dunn v.*

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The only real question, therefore, is whether the state, having a clear interest warranting intervention, has the right to designate the public official who will best act to uphold its interests. By legislative act, endorsed by both houses and the governor, the state has designated the county district attorney to do so in prison litigation. This selection is understandable: it is the district attorney who is the state's primary representative in securing

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Carey, 808 F.2d 555, 560 (7th Cir. 1986) ("Because a consent decree's force comes from agreement rather than positive law, the decree depends on the parties' authority to give assent. . . . Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them"); *National Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986) (because state official lacked authority to concede constitutionality of state law, consent decree which agreed that statute was unconstitutional was "void on its face"); *Overton v. City of Austin*, 748 F.2d 941, 956-957 (5th Cir. 1984) (court properly refused to approve consent decree where city officials sought to create new election system contrary to state law); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1135-1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) ("the abuses to which this devise [a consent decree] can be put are limited only by the almost inexhaustible imagination of litigants. . . . EPA and OSHA, for example, could consent not to conduct on site inspections without first rendering 60 days notice"), *cert. denied*, 467 U.S. 1219 (1984); *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983); *Cobb v. Aytch*, 539 F.2d 297, 301 (3d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977) (court erred in approving consent decree where the consenting party was not authorized under state law to consent to the invalidation of state procedures under the Pennsylvania Prison Transfer Act).

pretrial detention orders and bringing criminals to trial. Local prison keepers, like the existing defendants here, however, are charged to house whoever is committed to them by the courts, and may often be motivated more by budgetary and administrative matters than by the fundamental concerns of the criminal justice system.

But the bottom line is that it is the state, not the federal courts, that is in the best position to determine whether a public official has sufficient stake under its laws to represent the state's interests. This is simply a matter of the proper ordering of federal/state relations. Indeed, this Court has indicated that a state legislature does have the power to create state law interests that grant standing to a proposed intervener. *See Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986).

The Third Circuit rejected the state's designation here on the basis that the petitioner's interest in intervening was strictly a question of federal law, on which the Pennsylvania Legislature's view was of merely academic interest. The state, however, was not purporting to take over the function of deciding a Rule 24 intervention motion. Rather, in accordance with *Diamond*, and in direct response to the Third Circuit's earlier ruling in this case, the state was simply answering a *state* law question by clarifying that a district attorney's powers and duties, which are clearly set by state law, include representing the state's interest in litigation such as this. While Pennsylvania may not speak on the other aspects of Rule 24(a)(2) intervention, such as timeliness and adequacy of

representation, it may grant by statute the legal interest required for intervention.[5]

The federal courts are clearly bound by Pennsylvania's statutory choice of its representative. The Third Circuit's nullification of the Pennsylvania standing statute violates the well-established principle that state laws are the rules of decision in the federal courts and must be given full force and effect. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938); 28 U.S.C. § 1652. This ruling also disregards the tenth amendment's reservation of powers,

[5] Had it chosen to do so, Pennsylvania could have delegated to a single public official the responsibility of enforcing pretrial detention laws as well as administering local prisons. Pennsylvania, however, opted for a "checks and balances" system whereby one criminal justice official – the district attorney – is the state's "watchdog," delegated the state's authority to pursue legal challenges if local prison administrators seek to compromise public safety concerns for the sake of administrative convenience or perceived fiscal necessity.

The Third Circuit ruling effectively dictates to the state the manner in which it must delegate public functions. If Pennsylvania wishes to pursue legal challenges to federal prison releases that violate state law, it must delegate two separate public functions – prison administration and enforcement of the state's pretrial detention laws – to the same public official. *See* Argument II, *infra* (discussing the lower court's requirement that a proposed intervener could have been an original party to the litigation, *i.e.*, that the District Attorney must be liable for prison conditions before she is entitled to intervene). Should Pennsylvania fail to follow the Third Circuit's view of allocating responsibility among the various branches of state and local government, it will be denied a legal voice in federal prison releases which affect its most fundamental police powers.

particularly fundamental police powers, to the states. *See* U.S. CONST. amend.X.

The reasons for giving state statutes full force and effect are especially apparent in this case. Here, Pennsylvania has designated the District Attorney as the state official to ensure that local prison administrators comply with their state law duty to incarcerate pretrial detainees in accordance with state court commitment orders. Under the panel majority's analysis, the state's "watchdog" has no ability to seek compliance with the state's pretrial detention laws when the very persons intended to be "watched" (*i.e.*, the local prison administrators and the prisoners) use a federal consent decree to circumvent state laws.

The state has vital and fundamental police power interests at stake in this litigation. The state, and not the federal courts, should have the power to determine which public official will defend its interests. The federal courts simply do not have the authority to disregard controlling state statutes on this issue. This Court should grant review of the lower court's contrary interpretation of Rule 24.

II. A PROPOSED INTERVENER IN A FEDERAL LAWSUIT MUST NOT BE REQUIRED TO SHOW THAT SHE COULD HAVE BEEN AN ORIGINAL PARTY TO THE SUIT, WHERE FED. R. CIV. P. 24(a)(2) PROVIDES ONLY THAT AN INTERVENER SHOW AN "INTEREST" IN THE LITIGATION

This case is also appropriate for granting certiorari in order to resolve conflicting court of appeals authority. The Circuits are irreconcilably split on the standard for assessing the necessary "interest" of proposed interveners under Rule 24(a)(2).[6] In 1986, this Court recognized this split of authority in *Diamond v. Charles*, 476 U.S.

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[6] *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) ("party seeking to intervene need not possess the standing necessary to initiate a lawsuit"); *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-1213 (11th Cir. 1989) (party seeking to intervene need not demonstrate that he has standing in addition to the requirements of Rule 24); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986) (intervention interest must be greater than the interest required for standing); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984) (proposed intervener must meet Article III standing requirements); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (proposed intervener need not meet standing requirements); *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977) (party seeking to intervene under Rule 24(a)(2) need not possess standing sufficient to initiate a lawsuit).

at 68 n.21, but declined to resolve the conflict at that time. The Third Circuit panel majority in this case, however, has now created an even greater split of authority by determining that intervention should be denied on the basis of "inadequate interest" unless the proposed intervener can establish that he could have been an original party to the underlying litigation. Specifically, the panel majority held that the District Attorney has no "interest" for intervention purposes because the District Attorney (1) could not be made liable for the subject matter of the suit, (2) could not be subject to injunctive relief, and (3) could not be held in contempt (App. 21-22).

Contrary to the panel majority's new requirement, this Court requires a proposed intervener to establish only that he has "a significantly protectable interest." *Donaldson v. United States*, 400 U.S. at 531. This Court has also recognized that Rule 24(a)(2)'s legal interest requirement is less than that required to become a party,[7] and has permitted intervention under circumstances that would fail to meet the Third Circuit's new test.[8] The Third Circuit panel majority's new position, that a proposed intervener must establish that he could have been a

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[7] *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 536 n.7 (1972) (recognizing the distinction between intervention and initiation of a lawsuit, and citing with approval D. Shapiro, *Some Thoughts On Intervention Before Courts, Agencies and Arbitrators*, 81 Harv. L. Rev. 721, 726-729 (1968)).

[8] *See Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

defendant in the underlying litigation, has not been advocated by any other Circuit or legal commentator.[9]

The Third Circuit's newly created intervention barrier also conflicts with the Rule itself. The evolution of Rule 24 clearly establishes that a proposed intervener need not establish that he or she could properly be a defendant in the litigation. Prior to 1966, the Rule did not permit intervention in institutional litigation unless "the applicant is or may be bound by the judgment."[10] In 1966, the Rule was amended to eliminate the "bound by the judgment" requirement and instead now requires a timely applicant to meet a three-part "interest-impairment-inadequate representation" test.[11]

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[9] *See, e.g.*, D. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 Harv. L. Rev. 721, 726-729 (1968); Bullock, *Acid Rain Falls on the Just and Unjust: Why Standing's Criteria Should Not be Incorporated Into Intervention of Right*, 1990 U. Ill. L. Rev. 605; Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, U. Chi. L. Rev. 57:279, 284-291 (1990).

[10] Former Fed. R. Civ. P. 24(a)(2). This Court interpreted this rule to bar intervention unless the judgment in the action would bind the applicant as a matter of *res judicata*. *Sam Fox Publishing Corp. v. United States*, 366 U.S. 683 (1961). The current version of Rule 24(a)(2) was drafted to overrule the *Sam Fox* decision. *See Nuesse v. Camp*, 385 F.2d 694, 670 (D.C. Cir. 1967).

[11] Specifically, Rule 24(a)(2) establishes that an applicant must (1) claim an interest relating to the property or transaction that is the subject of the action, (2) be so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (3) have inadequate representation of his interest by the existing parties. Fed. R. Civ. P. 24(a)(2).

This case represents a clear and egregious misinterpretation of Rule 24(a)(2). Given the divergent views of the Circuits on the standard for showing an intervention "interest," this case provides this Court with an appropriate vehicle to clarify a discrete issue of significant and widespread importance. The split in court of appeals authority and the clearly erroneous Third Circuit decision justify review or a summary reversal by this Court.

CONCLUSION

For these reasons, petitioner, Lynne Abraham, respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1991

LYNNE ABRAHAM,

Petitioner,

v.

MARTIN HARRIS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Filed October 4, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1068 AND 91-1194

MARTIN HARRIS,
JESSE KITHCART,
JONATHAN LEWIS,
ROY COLD,
CAROL RANSOME,
JOHN CUMMINGS,
RAYMOND WHITTINGTON, and
DERRICK JONES

v.

JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia; REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System; J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison system; WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison; PRESS GROOMS, in his official capacity as Warden of the Detention Center; HARRY MOORE, in his official capacity as Warden of the House of Corrections; JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia; HON. W. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia; and THE CITY OF PHILADELPHIA

LYNNE ABRAHAM, District Attorney
of Philadelphia County, Proposed
Intervenor.

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-1847)

Argued September 5, 1991

BEFORE: STAPLETON, GREENBERG and ALDISERT,
Circuit Judges

(Filed: October 4, 1991)

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Liberty Bell Civic Association
Mayfair Civic Association
Millbrook Civic Association
Oxford Circle Civic Association
Parkwood Civic Association
Sandyford Civic Association
Somerton Civic Association
Tacony Civic Association
Upper Holmesburg Civic Association
Upper Northwood Civic Association
WalPac Civic Association
Wissinoming Civic Association

OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

BACKGROUND

The Philadelphia District Attorney, Lynne Abraham, appeals from two orders of the district court in this prison condition litigation. The appeal at No. 91-1068 is from an order of January 14, 1991, denying her motion to intervene and the appeal at No. 91-1194 is from an order of March 11, 1991, approving a settlement of the case. The district attorney has sought to intervene because she objects to aspects of the settlement providing for the release of certain prisoners. We will affirm the order denying intervention and accordingly will dismiss her appeal from the order approving the settlement. Furthermore, we will vacate an order we entered on August 15, 1991, partially staying the order of March 11, 1991.

This case is a class action originally filed in the district court in April 1982 by ten inmates of Philadelphia's Holmesburg Prison who alleged that the conditions at that prison were unconstitutional. The defendants are the City of Philadelphia and various city and state officials, not including the district attorney. In January 1984 the district court dismissed the action on *res judicata*, Eleventh Amendment, qualified immunity, and abstention grounds, in part because there was state court litigation concerning the constitutionality of the Pennsylvania state court prison conditions, but we reversed and remanded the case for further proceedings. *Harris v. Pernsley*, 755 F.2d 338 (3d Cir.), *reh'g denied*, 758 F.2d 83 (3d Cir.), *cert. denied*, 474 U.S. 965, 106 S.Ct. 331 (1985).

Subsequently, the plaintiffs filed an amended complaint expanding the class to include the inmates of all institutions comprising the Philadelphia prison system. Settlement negotiations commenced and on August 15, 1986, a proposed consent decree was filed. On August 19, 1986, the Philadelphia district attorney filed a motion to intervene as of right under Fed. R. Civ. P. 24(a)(2)[1] or, in the alternative, for permissive intervention under Fed. R. Civ. P. 24(b).[2] Thereafter, on October 3, 1986, partially because of the district attorney's views, a second consent decree was filed, which replaced the earlier consent decree.[3]

On December 31, 1986, the district court denied the district attorney's intervention motion and approved the second consent decree with some modifications. *Harris v. Pernsley*, 113 F.R.D. 615 (E.D. Pa. 1986), *aff'd*, 820 F.2d 592

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[1] Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statue of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[2] The district attorney has not appealed from the denial of the original motion for permissive intervention and thus it is not an issue in this appeal.

[3] Ronald Castille was the district attorney who filed the original motion to intervene but Lynne Abraham is now the district attorney. As a matter of convenience we are treating this appeal as though Abraham has been the district attorney throughout this litigation.

(3d Cir.), *cert. denied*, 484 U.S. 947, 108 S.Ct. 336 (1987). The district court found that the district attorney did not have a legally sufficient interest in the litigation to warrant intervention and it also found, per the requirements of Rule 24(a), that the district attorney's intervention motion was untimely and was thus prejudicial to the existing parties. 113 F.R.D. at 621-22. Furthermore, the district court believed that the city defendants adequately represented any interest the district attorney had in the litigation. *Id.* at 623. The district court, however, afforded the district attorney objector status. *Id.* at 625.

The district attorney appealed but we affirmed the order denying intervention, as we determined that her legal duties in the criminal justice system did not confer an interest warranting her intervention. Accordingly we did not reach the timeliness or adequacy of representation issues. However, we also noted our approval of the district court's actions affording the district attorney objector status. *Harris v. Pernsley*, 820 F.2d 592 (3d Cir.), *cert. denied*, 484 U.S. 947, 108 S.Ct. 336 (1987) [*"Harris"*].

Subsequently, Pennsylvania enacted a statute, effective May 24, 1988, which we will call "section 1108," purporting to confer automatic standing on the district attorney in prison litigation under which prisoners might be released or not admitted. The statute provides:

> Section 1108, *District attorneys' standing and interest in prisoner litigation*
>
> The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due

to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

18 Pa. Cons. Stat. Ann. § 1180 (Purdon 1991).[4]

Its legislative history reveals that section 1108 was intended to overrule *Harris's* denial of the motion to intervene. One of the bill's sponsors stated:

> this is a commonsense amendment it is reasonable to assume that our D.A.'s [*sic*], who, it is already recognized, have the power to advocate criminal sentences, the power to defend convictions in both state court actions and federal habeas corpus actions and the power to represent the Commonwealth generally in challenges of the constitutionality of the State's penal statutes, should also have the authority to intervene in lawsuits involving the release of county prisoners.

App. at 103 (statement or Representative Wogan). *See also* App. at 104 (statement of Representative Kosinski) ("the Wogan amendment is rational I feel that [the] D.A. does deserve standing . . . ")

On May 27, 1988, the district attorney, relying on section 1108, filed a second motion to intervene and on

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[4] Unsuccessful litigation challenging the validity of the statute on grounds not germane here was brought in the state court. *See Ritter v. Commonwealth*, 20 Pa. Commw. 374, 548 A.2d 1317, *aff'd*, 521 Pa. 536, 557 A.2d 1064 (1989).

June 3, 1988, sought a stay of implementation of the consent order pending disposition of the motion. The district attorney argued that section 1108 gave her "the right under Pennsylvania law to enforce continued institutional custody and admission of county prisoners." Thus, she asserted that she had a cognizable interest for intervention purposes in the "continued institutional custody and admission of county prisoners who are under state court orders of incarceration." The district attorney further asserted that her motion was timely and that her interest in the continued custody of county prisoners was not adequately represented by the city defendants. On June 6, 1988, the district court ordered expedited briefing on the intervention motion but denied the motion for a stay.

Though the district court in its opinion of June 6, 1988, did not rule on the intervention motion, it nevertheless considered it in connection with the motion for the stay. It viewed the intervention motion as implicating two stages of the litigation. One relating to merits and the other to remedy, an approach derived from *Harris*. *See* 820 F.2d at 599. The district court held that the district attorney was not likely to be successful in achieving intervention on the merits stage of the litigation, *i.e.*, the unconstitutional conditions issue, as section 1108 did not alter her duties in the criminal justice system. Therefore, the analysis and result in *Harris* remained applicable.

However, the district court found that the district attorney was likely to be successful to the extent that she sought to intervene in the formation of the remedial terms of the settlement. Although section 1108 did not change her duties. It purported to grant her the right to

seek equitable relief necessary to protect her interest in the continued custody of prisoners. The district court found that

> [w]hile it remains true . . . , that the District Attorney can have no interest in assuring the incarceration of persons under unconstitutional conditions, [her] cooperation in the remedial aspect of this decree would most likely be helpful to the court. Therefore, while the state legislature cannot create an interest after the fact, the continuing nature of the equitable relief provided for suggests the likelihood the District Attorney will be successful in some form of limited intervention to effectuate the purposes of the Consent Decree.

App. at 652-53.

Nevertheless, the district court denied the motion for the stay for reasons which we need not set forth.[5]

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[5] The district attorney relies on this statement to show that she has a right sufficient to sustain intervention but we reject that contention. The statement regarding the likelihood of success in intervention with respect to the remedy was made on a ruling on the motion for a stay, a context very different from that in which the district court eventually denied the second motion to intervene. In addition, the district court stated that the district attorney might be successful in achieving "some form of limited intervention." In fact, in practical terms, the objector status afforded the district attorney achieved that result. *See also* app. at 686, n.3 where the district court, in denying the district attorney's second motion to intervene, made a similar observation. In any event, in view of Fed. R. Civ. P. 54(b), the district court was not bound by its original observations.

On June 13, 1988, the plaintiffs filed a response opposing the intervention request for any purpose and on June 15, 1988, the city defendants filed a response to the motion stating that intervention should be granted with respect to ongoing matters involving the release or non-admission of county prisoners. The district attorney's position was that she should be permitted to intervene only to participate in proceedings which may affect the release or non-admission of Philadelphia prisoners.

The district court denied the motion to intervene on January 14, 1991. While the district court found that the motion to intervene was timely, it concluded that section 1108, although intended by the legislature to confer standing on the district attorney to intervene, did not do so. The court found that the statute did not grant the district attorney any state law duties or rights supporting intervention. Thus, the district court did not address the question of whether the city defendants adequately represented the district attorney in the litigation.

On January 23, 1991, the district attorney appealed from the order denying intervention. On March 11, 1991, the district court approved a final proposed consent decree which modified the second consent decree the court earlier had approved. Even though the district attorney was not permitted to intervene, she was allowed to submit written objections to this proposed consent decree, which she did, and was granted argument on her objections. On March 12, 1991, the district attorney appealed from the order of March 11, 1991, and the plaintiffs have moved to dismiss that appeal, a motion we

will grant. *See Harris*, 820 F.2d at 603 (one properly denied intervention cannot appeal the merits of a case).[6]

HARRIS AND THE MOTIONS TO INTERVENE

In *Harris*, 820 F.2d 592, we upheld the denial of the district attorney's original intervention motion and on this appeal she starts from the assumption that we cannot question that decision on the basis of the law as it was when we decided that appeal.[7] Instead she relies on section 1108, which purports to confer automatic standing on the district attorney in prison litigation which might result in the release or non-admission of prisoners and can only be seen as a direct response by the legislature intended to overrule our opinion affirming the denial of the district attorney's first motion for intervention.

When the district attorney moved to intervene after the enactment of section 1108, the district court denied her motion as it was not convinced that section 1108 had

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[6] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Subject to the circumstance that the appeal at No. 91-1194 must be dismissed, we have jurisdiction under 28 U.S.C. § 1291. We review the order denying intervention under an abuse of discretion standard but will reverse if we conclude that the district court has applied an improper legal standard or reached a decision we are confident is incorrect. *Harris*, 820 F.2d at 597.

[7] This is undoubtedly so, for quite aside from considerations of the law of the case, our internal operating procedures require that we regard *Harris* as binding unless its result cannot withstand an intervening change in the law from some source other than this court.

given the district attorney sufficient legal interest which she previously lacked. The crux of the issue before us is whether the district court erred in finding that section 1108 did not somehow change the situation so as to warrant the grant of the motion to intervene. Accordingly, we will review our analysis and reasoning in *Harris* and then consider the district court's reasons for rejecting the second motion.

Denial of the First Motion to Intervene

Under Fed. R. Civ. P. 24(a)(2), a person may intervene as of right if (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in litigation. *Harris*, 820 F.2d at 596. Although these requirements are intertwined, each must be met to support intervention as of right. *Id.* In *Harris*, we focused on the second requirement of Rule 24(a), whether the district attorney had a sufficient interest in the litigation "[b]ecause of its pervasive importance in the setting of the case." 820 F.2d at 596. We noted that an exact definition of the kind of interest justifying intervention remained elusive and that courts had described the level of interest required as "significantly protectable," "legally protectable," and "direct" as opposed to contingent or remote. *Id.* at 596-97.

The district attorney asserted that her interest in the litigation was implicated in her duties as a public official. *Id.* at 597. The district attorney is the public official

charged with conducting in court all criminal and other prosecutions and advocates specific bail levels and appeals bail determinations with which she disagrees. The district attorney has the power to advocate sentences, to defend convictions, and to represent the state in challenges to the constitutionality of the state's penal statutes. In short, the district attorney is charged with enforcing the state's criminal statutes. *Id.* at 598.

The district attorney argued that these duties supported her right to intervene in this prison condition litigation because a limitation on prison population, which was a fundamental aspect of the consent decrees, would interfere with her prosecutorial powers. First, the district attorney argued that a prison cap would result in the release of inmates who had not posted the set bond or inmates who had not served full sentences. This, in turn, would result in wasted work and would hamper her ability to prosecute cases because prisoners released without posting bond would not appear for trial. Second, she argued that the prison cap might make it impossible for the city prisons to admit additional prisoners and would thus interfere with her duties because her function as a prosecutor would be rendered meaningless. *Id.* at 599.

We noted that the scope of the district attorney's interest was defined by her legal duties under Pennsylvania law and that if her rights and duties, as defined, would be affected directly by the litigation, the district attorney would have a sufficient interest to intervene as of right. *Id.* at 597. We considered the district attorney's motion to intervene in two stages; first, whether the district attorney had a right to intervene to oppose the

claims of unconstitutional conditions in the prisons and second, whether she had the right to participate in the formation of a remedy. *Id.* at 599. We found that the district attorney had not proven an interest sufficient to allow intervention as of right at either stage.

We found on the merits phase of the constitutional claim that the city defendants, not the district attorney, were responsible for managing the prison system. More importantly, the city defendants could be liable if conditions were found to be unconstitutional. On the other hand, the district attorney had no legal duties or powers with regard to prison conditions and could incur no liability if conditions were found unconstitutional. Thus, her participation in the liability stage would not contribute to an understanding of the issues in the litigation and accordingly she had no interest entitling her to litigate the merits of the claim of unconstitutional conditions. *Id.* at 599-600.

We also found that the district attorney did not have a sufficient interest to intervene in the settlement or remedy phase. The consent decree proposed to the district court would not alter any of the duties of the district attorney and would not prevent her from performing her statutory duties. In particular, the district attorney could not be held in contempt for not carrying out the terms of the decree.

Although we recognized that the consent decree could affect the district attorney's powers in that certain detainees might not appear for trial, we found that this effect was "incidental" to and a "by-product" of the decree and was not enough to entitle the district attorney

to intervene as of right. *Id.* at 601-02. We indicated that the district attorney's interest in the litigation was of a general nature and not within the scope of her official duties. *Id.* Therefore, we found that the district court did not abuse its discretion in denying the district attorney's motion to intervene. *Id.* at 603. Because we disposed of the intervention motion on this interest analysis, we did not consider whether the district attorney's motion was timely or whether any interest she had was being adequately represented by the city defendants. *Id.*

Finally, we noted that, although the district attorney was not entitled to intervene as of right, the district court acted appropriately in permitting her to be heard on the terms of the consent decree. We noted that allowing persons to appear in court, either as friends of the court or as interveners for a limited purpose, may be advisable where these parties can contribute to the court's understanding of the consequences of the proposed settlement. *Id.*

Denial of the Second Motion to Intervene – Section 1108

The district court, in rejecting the second motion to intervene.[8] found that section 1108 stated in conclusory

[8] In her second motion to intervene, the district attorney sought intervention only to participate in the formation of settlement and not in the litigation over the merits of the underlying constitutional challenge. *See* app. at 233 ("[P]etitioner does not wish to intervene to defend the constitutionality of [prison] conditions. . . . [P]etitioner wishes to intervene to participate only in those stages of the proceedings, including but not limited to hearings on the choice of remedies to correct any proven unconstitutional conditions. . . . ").

terms that the district attorney had legal standing in litigation involving the release or non-admission of prisoners and provided that she could seek equitable relief to protect that interest. However, the court found that:

> [t]he statute fails to change the role of the District Attorney sufficiently to mandate [her] intervention. The considerations that were dispositive of the issue in the Court of Appeals remain unchanged: the District Attorney still has no legal duty or power regarding prison conditions or administrative responsibilities over the Philadelphia prisons; the District Attorney does not have the responsibility of overseeing Philadelphia's criminal justice system; and the District Attorney would not be subject to liability if conditions were found to be unconstitutional in the Philadelphia prisons. Furthermore, Section 1108 does not impose any new legal duties or bestow any new powers on the District Attorney that are affected by the release and non-admission of pretrial detainees. The statute does not purport to alter the 'boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials.'

App. at 683-84 (quoting *Harris*, 820 F.2d at 602).

The district court cited the legislative history of section 1108 as indicating that it was passed in an attempt to overturn our decision in *Harris*, 820 F.2d 592, but *"without substantially altering the District Attorney's responsibilities."* App. at 684-85. The district court noted that the Pennsylvania legislature could have granted new legal duties or responsibilities to the district attorney that might be directly affected by the continued application of the release and non-admission provisions of the consent

decrees and that such added duties could confer an interest sufficient to sustain intervention. However, the court stated that it did "not believe that the Pennsylvania legislature ha[d] in fact changed the District Attorney's responsibilities or given [her] a 'legal interest' in the *Harris* litigation within the meaning of Rule 24 as interpreted by the Court of Appeals."[9] The district court, however, found that the district attorney's second intervention motion was timely filed. The district court did not specifically consider the question of whether any interest the district attorney might have was not being adequately represented by the city defendants. However, the district court did adopt the reasoning from its earlier order and opinion in which it denied the first intervention motion and in which it found that any interest the district attorney had was being adequately represented by the city defendants. *See* app. at 688 ("[f]or the reasons stated, and the reasons in the court's opinion denying the District Attorney's original motion to intervene, later affirmed on appeal, the District Attorney's motion is denied.")

CONTENTIONS ON APPEAL

On appeal, the district attorney argues that the district court erred in concluding that section 1108 did not

[9] The district court also noted that the district attorney's argument had been previously rejected in a federal court action concerning conditions at the Philadelphia Youth Study Center. Although that opinion was later vacated, the district court noted its belief that the court's opinion and reasoning on the district attorney's section 1108 argument were correct.

confer on her an interest sufficient to warrant intervention of right. Her basic argument is that the district court erred in finding that section 1108 did not alter the situation vis-a-vis the first motion to intervene. That motion to intervene, as we noted in *Harris*, 820 F.2d at 597, was based on the district attorney's legal *duties* in the criminal justice system. The district court found, and we agreed, that the district attorney's duties were not sufficiently connected to prison conditions to warrant intervention of right.

The district attorney's position here is that section 1108 conferred *rights* on her sufficient to sustain her motion to intervene. The district attorney argues that a party's *rights* being affected via an action warrant intervention just as do a party's *duties* being affected. Thus, the district attorney argues that the district court erred in focusing on the fact that section 1108 did not confer any new responsibilities on her which might be implicated by the consent decree. Rather, according to the district attorney, the district court should have recognized that section 1108 conferred rights on her which would be directly implicated via the consent decree.

The appellees' (both the plaintiffs' and the city defendants') position is, of course, to the contrary. The appellees argue that section 1108 does not make a clear-cut change which would warrant the district court in finding an interest supporting intervention. The appellees urge that the same reasons for denying intervention in *Harris* remain applicable and that intervention is still not warranted. In fact, they argue that this court is bound by *Harris*. Our analysis of section 1108 proves appellees' argument the better one.

ANALYSIS

Section 1108 grants three possible "rights" to the district attorney. We repeat the section to demonstrate the rights:

> The district attorney *shall receive written notice* of, and *shall have automatic standing and a legal interest in*, any proceeding which *may involve the release or nonadmission* of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney *may seek any equitable relief* necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

First, section 1108 gives the district attorney the "right" to receive written notice of proceedings affecting release or non-admission of prisoners. Second, it purports to give the district attorney a legal interest in such proceedings. Third, it provides that the district attorney may seek equitable relief necessary to protect her interest in continued prisoner custody. An analysis of these three "rights" shows that the legislature's attempt at requiring the district court to grant the district attorney intervention as of right must fail.[10]

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[10] It should be noted that the motion to intervene is founded on Rule 24(a)(2), and not Rule 24(a)(1). Rule 24(a)(1) provides that intervention of right exists when a statute *of the United States* confers an unconditional right to intervene but the rule does not provide for intervention of right when a state

(Continued on following page)

The first "right" – that of notice – in no way supports intervention. There has never been a claim that the district attorney did not have notice of the prison litigation underlying this case. Furthermore, the mere granting to the district attorney of the right to receive notice has no effect on the district attorney's performance of her duties in the criminal justice system. Second, even viewing the notice requirement in terms of rights as opposed to duties, the right to notice is not material in an analysis of actual powers. There is simply not enough substance to that right to give the district attorney a substantial protected interest in the litigation.

Second, the automatic standing purportedly conferred by section 1108 cannot be the basis for intervention. Whether the district attorney's legal duties as defined by Pennsylvania law are sufficient to give the district attorney the right to intervene is a question of federal law. *Harris*, 820 F.2d at 597 n.7. Simply stating that the district attorney has a legal interest does not make it so. The purported legal interest is still subject to the interest analysis that we used in *Harris*. Utilizing this

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(Continued from previous page)

statute confers an unconditional right to intervene. Absent a federal statute conferring an unconditional right to intervene, a party's right to intervention under Rule 24(a) is subject to the analysis determined by subsection (2). Thus, the party must make a timely motion and have a sufficient interest in the litigation, which might be impaired by a disposition in the litigation and is not adequately represented by existing parties. And although the proposed intervenor's interest may be shaped by state law, as in this case by the district attorney's legal duties under state law, whether these duties sustain intervention is a matter of federal, not state, law.

analysis, section 1108 makes no changes that warrant finding an interest where none was found before.

Section 1108 does not change the fact, dispositive in *Harris*, that the district attorney's role in the Philadelphia criminal justice system does not involve prison conditions, the issue in this suit. Rather, the district attorney has the power and duty to represent the Commonwealth in the enforcement of its criminal laws. This includes the power and duty to conduct all criminal prosecutions, to advocate bail levels, to advocate sentences, to defend convictions, and to represent the Commonwealth in challenges to the constitutionality of its penal statutes. *Harris*, 820 F.2d at 598. It does not include any duty with respect to the conditions of the prisons, as that responsibility continues to belong to the Department of Public Welfare and the Board of Trustees of the Philadelphia Prison System. Of course, as this case illustrates, matters involving duration or conditions of custody "may involve" the district attorney and may affect the release or non-admission of prisoners. That, however, is not enough to warrant standing. In *Harris*, we recognized that the proposed consent decree might have an *incidental* effect on the custody and non-admission of prisoners. Nonetheless, we found that the district attorney did not have an interest warranting intervention. Section 1108 does nothing to augment that incidental effect. The effect which the release or non-admission of prisoners may have is still incidental to the crux of the underlying litigation, which involves the constitutionality of prison conditions.

Section 1108 does not make the district attorney liable for prison conditions; nor does it put her in a position in which she will be the subject of injunctive relief or a

contempt citation. These were two major points in *Harris* underlying our determination that the district attorney did not have a sufficient interest to warrant intervention. Section 1108 does nothing to change them.

The Pennsylvania legislature *could have* utilized section 1108 to confer on the district attorney duties or responsibilities sustaining her right to intervene by making the district attorney responsible for overseeing prison conditions, but it did not do this. Rather both before and after the enactment of section 1108, the district attorney was and is responsible for prosecution but was not and is not responsible for the conditions of prisoners' incarceration. These conditions are the subject of this suit and the district attorney's role in the criminal justice system has no impact on the prison conditions issue.

Finally, section 1108 provides that the district attorney may seek equitable relief "necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees." This provision cannot support intervention. First, it *assumes* that the district attorney has an interest warranting intervention. As discussed above, the district attorney did not have such an interest before the adoption of section 1108 and that section does not purport to change the interest that she had before its passage. Second, even given the district attorney's general interest in the litigation, *see Harris*, 820 F.2d at 602-03 (the district attorney's interest in the litigation is of a general nature), the fact that the district attorney might seek equitable relief to protect that general interest does not *per se* mean that the district attorney has an interest in the litigation warranting intervention.

On this point the district attorney refers to a ruling by the Pennsylvania Commonwealth Court which she claims relied on section 1108 to support the district attorney's right to seek a peremptory mandamus order. In *Castille v. Department of Public Welfare*, No. 2533 C.D. 1988, the district attorney field a complaint in mandamus and a motion for a peremptory mandamus against the Department of Public Welfare. As she characterizes that action, the district attorney, "based upon the rights granted by Section 1108" sought an order compelling the department to accept promptly adjudicated delinquents committed to state treatment facilities by the Philadelphia family court. *See* brief at 19; app. at 215.

In response the department contended, *inter alia*, that the district attorney lacked standing to assert these claims and that the district attorney did not have a legal right to the requested relief. But, as the district attorney explains, "[t]he Commonwealth Court nevertheless entered an order partially granting the motion for peremptory mandamus and ordered the Department 'to make available equivalent services to children in equivalent facilities forthwith.' " Brief at 19; app. at 215-16.

According to the district attorney, the issuance of the peremptory mandamus "constitutes a clear recognition of the District Attorney's rights to compel institutional custody and care under Section 1108." Brief at 19-20. The district attorney argues that in order to issue the mandamus, the court *must have* found that she had a right to seek mandamus under section 1108. "Thus, the only Pennsylvania Court to address the issue of whether Section 1108 grants the District Attorney any state law rights

has *implicitly* ruled, by the grant of a peremptory mandamus, that the District Attorney had a clear legal right to compel institutional custody for juvenile delinquents." Brief at 20. [Emphasis added].

As to the issue before this court, the district Attorney asserts that her *right*, via section 1108, to seek to compel institutional custody of prisoners through a mandamus action would be impaired by the remedies presently encompassed in the proposed consent decree. That is, the district attorney's right to pursue a mandamus action to compel Philadelphia to provide institutional facilities for pretrial prisoners ordered detained in lieu of bail, which prisoners can only be held in Philadelphia jails, would be impaired by a federal order requiring the release, or non-admission, of prisoners. Brief at 21.

The appellees make two arguments in response to the district attorney's reliance on *Castille*. First, the appellees (specifically the plaintiffs), point out that the memorandum and order issued in *Castille* nowhere mention section 1108. Thus, it is not clear that the Commonwealth Court found that section 1108 granted the right alleged by the district attorney. It seems altogether possible that the court simply assumed that the right to seek mandamus existed *separate* from section 1108, which would explain why section 1108 is not mentioned in the Commonwealth Court's order partially granting peremptory mandamus.

Second, the appellees assert that nothing in the consent decree in the case affects the power of the district attorney to seek mandamus under section 1108 to compel institutional custody of all county prisoners. The district attorney may petition a state court to compel the city to

perform a legally mandated function involving prisoner custody, but that ability is subject to constitutional restraints. Therefore, as the appellees see it, that right, to the extent it exists, remains and is unaffected by the proposed consent decree except that the decree sets forth the constitutional parameters of the right. However, the appellees contend that the district attorney does not have a right to intervene merely because she may seek mandamus to compel incarceration of prisoners.

We agree with the appellees. The right to seek equitable relief purportedly granted by section 1108 does not change the applicability of *Harris* and its result to the *present* intervention motion. It does not change the dispositive facts in this case; the district attorney's role in the criminal justice system does not involve prison conditions; the district attorney is not subject to liability or a contempt order for violating the constitutional rights of prisoners for prison conditions and any effect on the district attorney's role in incarcerating prisoners caused by the consent decree remains incidental. Most importantly, *if* the consent decree has any effect on the district attorney's right to seek equitable relief, such effect is still incidental. The consent decree does not specifically remove any such right. Rather, if it does anything, it imposes constitutional limitations on the right in that the district attorney cannot compel custody under unconstitutional conditions.

Thus, just as the conclusory attempt in section 1108 to confer standing cannot create the necessary interest to warrant intervention, the provision purporting to confer the right to seek equitable relief to protect the district

attorney's interest also does not alter the analysis and result reached by this court in *Harris*.[11]

CONCLUSION

We will affirm the order of January 14, 1991, appealed at No. 91-1068, we will dismiss the appeal at No. 91-1194, and we will vacate our order of partial stay of August 15, 1991.

ALDISERT, *Circuit Judge*, dissenting.

I totally disagree with the majority.

I would conclude that the Pennsylvania legislature has conferred the necessary legal interest upon the District Attorney of Philadelphia to intervene in these proceedings, that the district court abused its discretion in not permitting intervention, that only the portion of the consent decree entered by the district court pertaining to the release of certain pretrial detainees be vacated and that the stay previously entered by this court remain in effect until the District Attorney has had the full opportunity to participate in the district court proceedings as an intervenor. Accordingly, I dissent.

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[11] As an alternative ground for affirming, the plaintiffs contend that the district court abused its discretion in holding that the attorney's motion to intervene was timely. In view of our results, we do not reach that issue.

I.

In the scheme of things, it is comfortable and tidy to take the position adopted by my colleagues of the majority. That position does not upset any procedural apple carts. It does not disturb any component of a very delicate consent decree, an agreement ultimately fashioned by a skillful, innovative and extremely patient district judge who labored for nine long years to summon warring factions to the settlement table, to compel them to negotiate in good faith and to painstakingly bring about a long-range, complicated, albeit partial, cure to the fulminating cancer of urban prison overcrowding.

The disease is not limited to Philadelphia. The problem is nationwide. The solutions have not come forth voluntarily; they have emanated from scores of lawsuits such as this, where inmates have charged that contemporary jail and prison conditions violate the protections of the Eighth Amendment made applicable to the states through the Fourteenth. The normal political processes that allocate finances to public functions in cash-poor municipalities have been unable to solve the problem. The brute fact is that there are no political action committees espousing the cause of those who are incarcerated and no groundswell of public opinion demanding that substantial public funds be committed to improving the physical well-being of those accused of violating society's rules.

Consequently, federal district judges have been anointed as political power brokers to perform the legislative and executive responsibilities normally entrusted to municipal, county and state office holders. What these

state and local officials have refused to do voluntarily, they ultimately agree to do, at least to some extent, as the result of the wheedling and cajoling of the judges who constantly hold over their heads a Sword of Damocles. It is a sword feared by the inmates and public officials alike: The inmates fear that the court will find no constitutional violation; the public officials fear that a post-litigation decree will cost more to implement than one achieved through settlement. Thus, in recent years, the courts have formed an extensive body of prison confinement jurisprudence, essentially constructed from consent decrees.

The success of these decrees has been limited by their level of public acceptance. Forming the agreements has been "only half the fun"; implementing them through higher taxes or by constricting other public services can lead to serious political problems. Thus, although the solution has been achieved by consent of the parties, rather than by post-trial decree, it is critical that the general public believe that the parties have considered the public's diverse interests, at least those represented by elected officials, in hammering out the agreement. When this does not take place, the agreement is suspect.

From a political science standpoint, public opinion poses a serious threat to the vigorous effort by the inmates and city officials to exclude the District Attorney from participating in an agreement providing for the release of a substantial number of pretrial detainees, especially in view of the undisputed fact that such release will result in a substantial, if not formidable, number of defendants failing to appear at trial. Given the gravity of this concern, the anxiety expressed by the District Attorney cannot be considered illegitimate. To exclude the

District Attorney as a full-fledged partner in the settlement dialogue is to threaten the eventual public acceptance of this consent decree.

The defendant city officials in this case robustly declare that the District Attorney has no role in this litigation because the interests of Philadelphia's citizens in public safety and effective criminal justice are adequately protected by the present parties. Counsel insisted at oral argument that city officials had fully considered and defended these interests in the suit and had not agreed to this decree merely for reasons of fiscal expedience. Tr. at 67-71. These abundant assurances call to mind the words of Shakespeare: "The lady doth protest too much, methinks."[1] Exclusion of the District Attorney can only serve to diminish public confidence in the consent decree.

Even worse, should a pretrial defendant released under the plan commit some terrible crime, the public fallout would be nuclear. I raise the specter of another Willie Horton-type incident with some trepidation, because this argument may seem to appeal to unreason and prejudice. But we cannot disallow the possibility that such an event would undermine public acceptance of the consent decree, which, as stated above, is critical to the effective functioning of judicially brokered agreements of this type.

Thus, from the standpoint of the Philadelphia public's ultimate acceptance of the consent decree, I believe

[1] Hamlet, act 3, sc. 2, line 242.

that the parties to the agreement, and especially the district court, erred grievously in opposing and denying the limited intervention sought by the District Attorney in these proceedings.

I readily admit that political science concepts are not sufficient to control the outcome of this case. Legal precepts must and should control. Because this case is but another increment to the growing body of prison-capacity jurisprudence concocted by consent decrees, however, I deem these observations important, particularly because experience informs us that this is not the last that this court will hear of the consent decree entered in this case. And even casual research produces numerous citations to other consent decree cases that have occupied our repeated attention.

Turning now turn to the legal precepts that should govern this case, I conclude that the issue is not even close. The district court erred as a matter of law in thumbing its nose at the Pennsylvania legislature.

II.

This is merely a case of statutory (or rule) construction. We are required to decide whether the District Attorney qualifies as an intervenor of right under Rule 24(a)(2), Fed. R. Civ. P., which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the

> action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We do not write on a clean slate here. This court has already announced the law of the case. In *Harris v. Pernsley*, 820 F.2d 592 (3d Cir. 1987), we set forth the following legal precepts that controlled the issues then as well as those before us now:

> 1. "The scope of [the District Attorney's] interest is defined by the scope of [her] legal duties under Pennsylvania law." *Id.* at 597 (footnote omitted).
>
> 2. "Whether the legal duties as defined by Pennsylvania law are sufficient to give the District Attorney the right to intervene is, however, a question of federal law." *Id.* at 597 n.7.
>
> 3. "[T]o have an interest sufficient to intervene as of right, 'the interest must be a "legal interest as distinguished from interests of a general and indefinite character." ' " *Id.* at 601 (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980)).

Applying these precepts against the backdrop of Pennsylvania law as it existed at that time, we held that the Commonwealth of Pennsylvania had not conferred upon the District Attorney the right to intervene:

> We must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials. But we must decline to equate the District Attorney's function as the spokesperson for Pennsylvania's interest in criminal prosecutions with the

> responsibility for policing the entire criminal justice system. Although we agree with the District Attorney that the decree may result in some individuals not appearing for their scheduled trial dates and some people not having to post bond before being released, this by-product of the decree is not sufficient to give the District Attorney the right to become a party to any consent decree entered in this case. . . .
>
> . . . .
>
> We therefore conclude that the District Attorney has not asserted a sufficient interest to intervene in this action as of right.

Id. at 602.

We also concluded that in 1987 as a matter of Pennsylvania law

> [t]he District Attorney . . . has no legal duties or powers with regard to the conditions of the Philadelphia prison system . . . [and] does not have the right to prevent the City from effectuating its reasoned judgment that it is best not to litigate the action. Otherwise stated, the District Attorney has no interest entitling him to litigate the plaintiffs' contention that the conditions in the Philadelphia prison system are unconstitutional.

Id. at 600.

This was the state of Pennsylvania law on May 15, 1987, when we handed down our decision. One year later, almost to the day, the Pennsylvania legislature changed the law by enacting 18 Pa. Cons. Stat. Ann. § 1108, effective May 24, 1988. This change in the substantive law of

Pennsylvania compels us to change our view on the District Attorney's right to intervene in this case.

III.

In examining the new statute, we emphasize what we previously said in *Pernsley* that the scope of the District Attorney's interest is "defined by [her] legal duties under Pennsylvania law." 820 F.2d at 597 (footnote omitted). As conceded by the majority, the legislative history discloses that section 1108 was intended to overrule *Pernsley's* denial of the right to intervene. Representative Wogan, the author of the amendment, stated:

> [T]his is a commonsense amendment. It is reasonable to assume that our D.A.'s who, it is already recognized, have the power to advocate criminal sentences, the power to defend convictions in both State court actions and Federal habeas corpus actions, and the power to represent the Commonwealth generally in challenges of the constitutionality of the State's penal statutes, should also have the authority to intervene in lawsuits involving the release of county prisoners.

Pennsylvania Legislative Journal-House, Nov. 24, 1987, at 1951; App. at 103. The merits of the amendment were energetically debated on the floor, and arguments were presented on both sides. *See id.* (statement of Rep. Freind) (arguing that District Attorney should be permitted to intervene to challenge constitutionally of consent decree); *id.* (statement of Rep. Evans) (arguing that District Attorney has had sufficient input into litigation and should not

be authorized to intervene); *id.* at 1952; App. at 104 (statement of Rep. Kosinski) (arguing that District Attorney should be allowed to intervene in order to press public safety concerns raised by consent decree); *id.* at 1955; App at 108 (statement of Rep. Fattah) (arguing that consent decree's release provisions would not unduly threaten public safety and that District Attorney should not be permitted to intervene). Following this debate, the House agreed to the amendment by an overwhelming majority of 175 to 22. *Id.* at 1955-56; App. at 108-09.

The statute provides:

> *District attorneys' standing and interest in prisoner litigation*
>
> The district attorney shall receive written notice of, and shall have *automatic standing and a legal interest* in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

18 Pa. Cons. Stat. Ann. § 1108 (Purdon 1991) (emphasis added).

But this mandate of the Pennsylvania legislature conferring a legal interest as a matter of state law in the proceeding at bar was not enough for the plaintiffs, the

City or the district court. In a truly fascinating expression, the district court concluded that because the legislature did not confer upon the District Attorney a "legal duty or power regarding prison conditions or administrative responsibilities over the Philadelphia prisons," the legislature lacked the power and authority *under state law* to grant or bestow a legal interest in any proceeding which may involve the release or nonadmission of county prisoners. D.C. Mem. & Order at 5-6; App. at 683-84. I call this utterance and conclusion "fascinating" because it flies far beyond the outer limits of mere sophistry or fallacious reasoning and becomes a federal judicial fiat rendering a state statute null and void. No one has alleged, in either the district court or this court, that section 1108 is unconstitutional under the Pennsylvania or federal constitutions, and unless and until this statute is declared unconstitutional – either because it violates a specific substantive provision or because it violates the Supremacy Clause of the United States Constitution – we must give it full force and effect.

The Judiciary Act of 1789 established state laws as the rules of decision in federal courts, and this statutory command remains in force today. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938). Moreover, 28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.

There was no contention in the present case that section 1108 offended concepts of substantive due process or equal protection or any other constitutional provision. There was no argument that failure to bestow upon the District Attorney the responsibility of overseeing Philadphia's criminal justice system or power over Philadelphia's prisons made the statute unconstitutional under the rational basis test, or intermediate or strict scrutiny, or any other standard we normally apply in testing the constitutionality of a validly enacted state of federal statute. There was no decision by the district court, or any other court declaring section 1108 unconstitutional.

Neither was any conflict with a federal statute or rule presented. The question whether a sufficient interest exists to permit intervention under Rule 24 (a)(2) is a question of federal, not state law, as the majority correctly observe. In order to intervene, the District Attorney must satisfy the three elements of Rule 24(a)(2): timeliness, an interest in the litigation and inadequacy of representation.

The conflict perceived by the majority centers on the showing of an interest in the litigation. The rule is general, and this court has recognized that "what constitutes such an interest 'defies a simple definition.'" *Pennsley*, 820 F.2d at 596 (quoting *Restor-A-Dental Laboratories, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984)). In resolving the question, this court held in *Pennsley* that we must look to the District Attorney's duties as a public official, which are set out by Pennsylvania statute. *Id.* at 597.

This is where the majority depart from *Pernsley*. The majority hold that a statutory statement of a public offical's legal interest is insufficient to confer standing to intervene, absent some additional change in the scope of the offical's daily responsibilities. The source for this rule certainly cannot be found in *Pernsley*, which rested on a careful consideration of the District Attorney's statutory authority and responsibilities. *Id.* at 597-99.

This, apparently, is also where the majority perceive a conflict between section 1108 and Rule 24(a)(2). The majority seem to believe that section 1108 circumvents Rule 24(a)(2) by granting the District Attorney a right to intervene, notwithstanding the requirements of the rule. Thus, by stating that the right to intervene is a question of federal law, the majority declare that the Pennsylvania legislature's statutory creation of a legal interest has no effect in the federal courts.

I cannot agree. The legislature has not attempted to supplant the requirements of timeliness and inadequacy of representation contained in Rule 24(a)(2). The legislature has spoken only to the existence of a legal interest, which it is manifestly competent to do. We are bound, as was this court in *Pernsley*, to "respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials." *Id.* at 602. And when the Commonwealth has by statute assigned the District Attorney a legal interest in proceedings, we must recognize that interest as surely as we must follow any state statute, until that statute is declared invalid under the Constitution.

Nothing of the kind has transpired here. Instead, we saw a federal district judge refuse to recognize the unambiguous language of a state statute granting standing and conferring a legal interest. When this was done, we did not witness the traditional judicial process at work. In its place we saw the exercise of the type of naked judicial power that I thought went out with the demise of the kadi, the ancient Moslem magistrate who dispensed justice under a palm tree, beholden to no authority but the dictates of his own will. The district court sent a state statute to the gallows without benefit of clergy.

The bottom line is clear and irrefragable: "We must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials." *Id.* Whatever had been the extent of the District Attorney's rights, duties or responsibilities under Pennsylvania law prior to 1988, the passage of section 1108 has now given that public official "rights": "automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody." The unambiguous words of that statute must be given full force and effect unless and until a court of competent jurisdiction declares the statute to offend either the state or federal constitution.

The arguments advanced by the plaintiffs and the City before us – that the District Attorney has no legal duty or power regarding prison conditions or administrative responsibilities over the Philadelphia prison system or the responsibility of overseeing the city's criminal justice system – may be germane to a challenge to the

statute's constitutionally, but they are irrelevant in the case before us.

IV.

Why then have the district court and my colleagues of the majority been hospitable to these contentions and willing to cut jurisprudential corners? The answer is obvious. We are faced with a Philadelphia prison system that, arguably at least, cries out for modernization and physical improvement. As stated before, consent decrees form the bedrock of federal court prison conditions jurisprudence. The district court has labored nine long years to bring about a final settlement between counsel for the inmates and city officials, which settlement takes the form of a consent decree that addresses long-range as well as immediate problems. For over five years, the District Attorney has been struggling to participate as a full party in this case, filing her first motion to intervene on August 19, 1986.

I think that it is the fear of unravelling the fragile fabric of this agreement that impels the lively and vigorous opposition of the parties. I am persuaded that a ringing endorsement of the basic contours of the settlement also motivates the actions of the district court and my colleagues of the majority. They are convinced that the ultimate objectives of the decree are desirable and congruent with the best ideals of public policy. So am I, except that I would be far more comfortable if the District Attorney were made a party and full participant in this litigation, as section 1108 requires.

I differ with them only to the extent that I will not take jurisprudential shortcuts to achieve this result and cheapen the rule of law along the way.

Accordingly, I dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, JESSE KITHCART, JONATHAN LEWIS, ROBERT FOUCHE, JAMES O. JOHNSON, CARLSON BROWN, KEVIN CHAPMAN, and VALERIE DRAKEFORD	:	CIVIL ACTION
v.	:	
JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison System, WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison, PRESS GROOMS, in his official capacity as Warden of the Detention Center, HARRY MOORE, in his official capacity as Warden of the House of Corrections, JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia,	:	

HON. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia, and THE CITY OF PHILADELPHIA	:	NO. 82-1847

ORDER

(Filed Sept. 21, 1990)

AND NOW, this 21st day of September, 1990, following a status hearing held on September 19, 1990, it is hereby **ORDERED** that this court's qualified admissions moratorium Order of June 1, 1990, is **AMENDED** for the duration of the current emergency crowded conditions by deleting Paragraph 3(C), and substituting a new Paragraph 3(C) as follows:

> C. Drug charges on which the defendant could be sentenced under 18 Pa.C.S.A. § 7508, provided that the defendant is charged with possessing over:
>
> (1) 50 pounds of marijuana; or
>
> (2) 50 grams of heroin; or
>
> (3) 50 grams of cocaine; or
>
> (4) 10 grams of cocaine base[crack]; or
>
> (5) 50 grams of methamphetamine or PCP; or
>
> (6) 25 grams of amphetamine; or
>
> (7) 200 tablets of methaqualone

The qualified admissions moratorium incorporating this revision, effective 12:01 a.m., Saturday, September 22,

1990, is attached. All other provisions of said Order remain unchanged until further Order of the court.

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, JESSE KITHCART, JONATHAN LEWIS, ROBERT FOUCHE, JAMES O. JOHNSON, CARLSON BROWN, KEVIN CHAPMAN, and VALERIE DRAKEFORD	:	CIVIL ACTION
v.	:	
JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison System, WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison, PRESS GROOMS, in his official capacity as Warden of the Detention Center, HARRY MOORE, in his official capacity as Warden of the House of Corrections, JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia,	:	

HON. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia, and THE CITY OF PHILADELPHIA : NO. 82-1847

ORDER

AND NOW, this 21st day of September, 1990, it is **ORDERED** that a qualified moratorium on admissions to the Philadelphia County prisons shall be in effect as follows:

1. The City of Philadelphia, the Board of Trustees of the Philadelphia prison system, their employees, agents and all persons acting in privity therewith, in particular, but without limitation, the Commissioner of the Philadelphia prison system and the Warden of the Philadelphia Detention Center and his deputies, shall admit no pretrial detainees (as distinguished from convicted persons sentenced to time served in county prison, or awaiting transfer to state custody, and federal or state prisoners detained for immediate court appearances pursuant to Paragraph 2(h) of the court Order of December 30, 1986) until the number of inmates housed in the Philadelphia prison facilities subject to said Order is within the total maximum allowable population and is within the limitations of the individual institutions as set forth herein and new admissions will not cause the maximum allowable populations to be exceeded.

2. The population of the Philadelphia Prison System shall not exceed 3,750 inmates based on the population of the individual institutions as follows:

Detention Center (excluding hospital inmates)	750 inmates
Holmesburg	800 inmates
House of Correction	900 inmates
Modular Units	200 inmates
Laurel Hall	185 inmates
Cannery	65 inmates
Philadelphia Industrial Correction Center	850 inmates
TOTAL	3,750 inmates

In recognition of the additional persons arrested during the weekend, or those arrested when the state courts are closed (due to a holiday or otherwise) during the week, the maximum allowable populations stated above may be exceeded by up to 100 inmates three days per week (to include Saturday and Sunday) and on a weekday if the state courts are closed. The maximum allowable populations for the House of Correction, Holmesburg, the Detention Center (excluding hospital inmates), Modular Units and the Philadelphia Industrial Correction Center, however, shall not be exceeded to accommodate inmates on work-release or serving weekend sentences; said inmates if not on electronic monitoring shall be confined only at Laurel Hall or the Cannery (or other court-approved alternative facilities)[1] whenever the qualified moratorium on admissions is in effect.

3. This Order shall not prevent the admission of any persons charged with the following:

[1] Trailers to accommodate a weekend population of no more than 50 inmates have been authorized by the court to date.

A. Murder, attempted murder, forcible rape, attempted rape, involuntary deviate sexual intercourse, corrupting the morals of a minor, arson, kidnapping, aggravated assault, a crime of violence committed or attempted with a firearm, knife or explosives, and escape from custody.

B. Domestic Violence and Abuse Offenses:

(1) 18 Pa.C.S.A. § 2711 (Probable Cause Arrests in Domestic Violence Cases) (where the arresting officer has probable cause to believe the defendant violated: § 2505 relating to involuntary manslaughter; § 2701 relating to simple assault; § 2702 relating to aggravated assault; or § 2705 relating to reckless endangering);

(2) 35 Pa.C.S.A. § 10190 (Contempt arising from a violation of an order or consent agreement under the Protection From Abuse Act, 35 Pa.C.S.A. § 10186);

(3) 18 Pa.C.S.A. § 4955 (Contempt arising from a violation of a victim witness protective order under 18 Pa.C.S.A. § 4954); and

(4) 18 Pa.C.S.A. § 4952 (Intimidation of witnesses or victims).

C. Drug charges on which the defendant could be sentenced under 18 Pa.C.S.A. § 7508, provided that the defendant is charged with possessing over:

(1) 50 pounds of marijuana; or

(2) 50 grams of heroin; or

(3) 50 grams of cocaine; or

(4) 10 grams of cocaine base[crack]; or

(5) 50 grams of methamphetamine or PCP; or

(6) 25 grams of amphetamine; or

(7) 200 tablets of methaqualone

D. Persons who have two or more outstanding or open bench warrants on criminal charges other than summary offenses, provided that:

(i) A person admitted to the prison solely pursuant to paragraph 3D shall be released by the City on his or her own signature ("HvR-SOB"), unless a bench warrant hearing on all open bench warrants is held for such person within 48 hours of admission (excluding legal holidays), or in the case of a "judge-only" bench warrant, within ten (10) business days, and it is determined at the bench warrant hearing that the person: (a) did not voluntarily surrender; *and* (b) twice willfully failed to appear at scheduled proceedings on an open charge. A person not receiving a timely hearing on a "judge-only" bench warrant and:

(a) with no holding charge, shall be released by the City on the eleventh (11th) business day after admission; or (b) with a holding charge, shall not be detained by the City on the bench warrant. The Prison Population Management Unit's certification that a person

has not had a timely hearing on a bench warrant shall be retained in the prison file and the bench warrant shall no longer serve as a basis for detaining the person.

(2) The release of any person pursuant to Paragraph 3D(1) may be delayed upon written confirmation that the person is unable to appear for a bench warrant hearing because he or she is incompetent or otherwise on medical hold. In such a case, the release date may be extended for the time of actual retention on medical hold.

(3) A failure to provide a bench warrant hearing pursuant to Paragraphs 3D(1) and (2) shall preclude detention in the Philadelphia prisons by reason of bench warrants open at the time of arrest.

4. To reduce the current excessive overcrowding situation as promptly as is consistent with public safety, until the maximum population limits are met in all the Philadelphia prison facilities, the following release mechanisms will be in effect:

A. PPMU shall submit to the Special Master the name of any pre-trial detainee in categories listed in 4E for release by court order on his or her own recognizance (HvR-SOB), on electronic monitoring (HvR-EM) or to a community corrections facility (HvR-CCF); said name shall also be provided to the District Attorney or his designee, who may notify the Special Master of objections, if any, within 72 hours.

B. PPMU shall specially note any disciplinary infractions in the detainee's prison record or any other factors that suggest release the detainee would pose a risk of harm to himself, herself, or to others. The Special Master shall provide this information, any objection received from the District Attorney and the recommendation of the Special Master to the court within five (5) days.

C. Every pre-trial detainee released pursuant to this provision shall receive written notice of restrictions and obligations including a date, time and place of next scheduled court appearance; the City defendants are authorized to obtain the assistance of BailCARE in implementing this provision.

D. Forms for submission, objection, recommendation, notice and approval for release shall be provided promptly by PPMU.

E. Release categories shall be:

(1) a person admitted to prison under prior orders of the court who is still detained but who would not be admitted under this order as now modified;

(2) a prisoner held in default of the lowest amount of percentage bail as necessary to reduce the population in all institutions to the maximum allowable. If inmates considered for release under this paragraph are held in default of equal amounts of bail, preference shall be given to the inmate held the longest time.

(3) a person charged with offenses enumerated in paragraphs 3A and B shall

not be released pursuant to this paragraph.

(4) a person detained for violation of county probation or parole shall be released only in accordance with Paragraph 5.

5. A person against whom a detainer has been lodged under the authority of the Philadelphia Court of Common Pleas or the Philadelphia Municipal Court ("detainees") is ineligible for release, except as follows[2]:

A. If a detention (*Gagnon I*) hearing before a judicial officer is not held for the detainee within fifteen (15) days after the detainer has been lodged, subject to ¶ F below, PPMU shall certify that the detainer shall no longer hold the detainee and (i) any inmate without open charges shall be released from custody by the City on the eighteenth (18th) day after the detainer has been lodged, and (ii) any detainee with an open charge or charges shall be eligible for bail or release immediately, in accordance with the provisions of this court's moratorium and release orders, notwithstanding the detainer.

B. If a detainee is charged with a technical violation only (*i.e.*, the detainee is not charged with a new crime), unless a violation (*Gagnon II*) hearing is held for the detainee within thirty (30) days of the lodging of the detainer, subject to ¶ F below,

[2] The new provisions of this paragraph shall be effective as of April 9, 1990.

PPMU shall certify that the detainer shall no longer hold the detainee, and the City shall release the detainee on the thirty-third (33rd) day after the detainer has been lodged.

C. If a detainee is charged with a direct violation only (as indicated by absence of the detainer form of any reference to technical violations),

(1) unless the state court holds a second detention hearing before the judge under whose authority the detainer was lodged within thirty (30) days of the lodging of the detainer, subject to ¶ F below, PPMU shall certify on the thirty-third (33rd) day after the detainer has been lodged that the detainer shall no longer hold the detainee;

(2) if a state court orders the release of the detainee as to all pending criminal cases, pursuant to Pa.R.Crim.P. 1100(e), the detainer shall no longer hold the detainee;

(3) if a state court orders the dismissal, *nolle pros* or acquittal of all open criminal charges, PPMU shall, within three (3) days, certify that the detainer shall no longer hold the detainee;

(4) if a state court disposes of any criminal charge or charges other than by ¶¶ (2) or (3) above, unless the state court holds a violation hearing within ten (10) business days of the disposition of the open charges, subject to ¶¶ E and F

below, PPMU shall certify that the detainer shall no longer hold the detainee.

D. If a detainee is charged with both direct and technical violations,

(1) unless the state court holds a hearing within thirty (30) days after the detainer has been lodged, subject to ¶ F below, and either disposes of the detainer or makes a written record with a copy to PPMU that resolution of any alleged technical violation should await the disposition of an open criminal charge or charges, PPMU shall certify on the thirty-third (33rd) day after the detainer has been lodged that the detainer shall no longer hold the detainee;

(2) upon the disposition of the open criminal charge or charges, if the detainer has not been lifted, unless the state court holds a violation hearing within ten (10) business days of disposition of all open criminal charges, subject to ¶¶ E and F below, PPMU shall certify that the detainer shall no longer hold the detainee.

E. No detainer, except those lodged against an individual newly charged with or under parole or probationary supervision for offenses enumerated in ¶¶ 3A and 3B, shall hold a detainee more than one hundred eighty (180) days after the detainer is lodged, subject to ¶ F below.

F. PPMU shall not certify the detainee as eligible for release because a hearing or trial was not held within a required period of time if the state court convenes the hearing or trial within the required time period but does not make a determination because: (a) the detainee is absent from the courtroom; (b) the detainee or the detainee's counsel requests a continuance; (c) detainee's counsel is absent from the courtroom; and the state court convenes a second hearing or trial within ten (10) business days; or (d) the state court orders an examination and determination of the competency of the detainee pursuant to 50 P.S. § 7402(d)-(g); and the state court makes a competency determination within forty (40) days.

Unless the state court makes a written record with a copy to PPMU of the reason(s) for its failure to hold a hearing or trial and schedules a date certain either within ten (10) business days to which the hearing or trial is continued, or, in cases pursuant to subparagraph (d) above, schedules a date certain within forty (40) days on which the competency determination is to take place, it will be presumed that the reason for the failure is not (a), (b), (c) or (d) above.

A detainee whose hearing or trial has been continued pursuant to subparagraph (d) of this paragraph shall not be held in the general population of the prisons while the detainee is awaiting the competency determination, but rather shall be held in the Hahnemann Unit or under other conditions

or custody which are suitable from the standpoint of the detainee's apparent psychiatric needs and institutional security.

G. Prior to the release of any detainee, PPMU shall serve upon the detainee a subpoena for each listing of all criminal matters then scheduled. PPMU shall simultaneously deliver signed copies of all such subpoenas to the state court, through its designated agent, and the District Attorney's Office per Chief, Prison Litigation Unit. If any criminal matter has no scheduled listing at the time of the detainee's release, PPMU shall serve a subpoena requiring the detainee's appearance to obtain a court listing in Courtroom 617, Philadelphia City Hall, at 9:00 a.m., fourteen (14) days following the date of release, or, if the fourteenth (14th) day is on a weekend or an official holiday, on the next day during which the state court is in session.

H. Upon release of any detainee, PPMU shall notify the state court judge under whose authority the detainer was lodged and the state court through its designated agent of the release within three (3) business days.

I. Any PPMU certification referred to herein shall be in accord with the procedures attached hereto as Appendix A.

J. A defendant shall not be readmitted or held by the Philadelphia prison system by reason of a detainer reissued for the same alleged violation of probation that was the subject of the certified detainer.

6. The City of Philadelphia and/or any authorized officer of the City acting in the name of the Commonwealth of Pennsylvania shall not convey or deliver any person to the custody of the Commissioner of Prisons, except in compliance with this court Order, but shall release such person who may not be admitted pursuant to this Order.

The Commissioner of Prisons shall not receive any person into his custody or hold him or her until the next action date except in accordance with this court Order, notwithstanding any state criminal transcript order or other order to the contrary.

7. The City defendants shall regularly provide the Special Master, plaintiff class, and the Office of the District Attorney, with population figures as ordered by the court. Pre-trial detainees shall not be admitted to the Philadelphia Prisons without a *Harris v. Reeves REVIEW FORM*.

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, JESSE KITHCART, JONATHAN LEWIS, ROY COLD, CAROL RANSOME, JOHN CUMMINGS, RAYMOND WHITTINGTON, and DERRICK JONES	:	CIVIL ACTION
v.	:	
JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison System, WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison, PRESS GROOMS, in his official capacity as Warden of the Detention Center, HARRY MOORE, in his official capacity as Warden of the House of Corrections, JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia, HON. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia, and THE CITY OF PHILADELPHIA	:	NO. 82-1847

ORDER

(Filed DEC 28 1990)

AND NOW, this 28th day of December, 1990, upon consideration of the Stipulation and Agreement signed by the parties and dated December 20, 1990, IT IS HEREBY ORDERED that:

1. The Stipulation and Agreement, attached hereto as Exhibit 1, is preliminarily APPROVED and shall be entered as an Order of the court for the purpose of giving notice to class members of a hearing to be held at 11:00 a.m. on Monday, January 14, 1991.

2. Pending final approval, all court orders in this action remain in full force and effect, including without limitation, the Qualified Admission Moratorium Order of September 21, 1990, and the Order of November 14, 1990 (Paragraphs, 3, 4 and 5).

3. Objections to the Stipulation and Agreement will be considered by the court if submitted in writing on or before January 11, 1991, to William G. Babcock, Esquire, Special Master, P.O. Box 40008, Philadelphia, PA 19106.

4. a. Counsel for plaintiffs shall send notice to all named plaintiffs in the form attached as Exhibit 2.

b. City defendants shall publish notice to the class in the form attached as Exhibit 2.

c. Proof of publication shall be submitted at the hearing on January 14, 1991.

/s/ Norma L. Shapiro

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, *et al.*,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	NO. 82-1847
JOAN M. REEVES, *et al.*,	:	
Defendants.	:	

STIPULATION AND AGREEMENT

Plaintiffs and Defendants, by their attorneys, hereby stipulate and agree as follows:

STIPULATION

1. Under the terms of the Consent Order of December 30, 1986, the inmate population of the Philadelphia Prison System as a whole and of each facility within the system is limited to a Maximum Allowable Population ("MAP"). The Consent Order requires that the defendants impose a qualified admissions moratorium whenever the population exceeds the MAP. The Consent Order also requires that the defendants complete the construction of a 440-bed downtown detention facility by December 31, 1990.

2. As of the date of this Stipulation and Agreement, the population of the Philadelphia Prisons and of each individual facility has consistently exceeded the MAP notwithstanding the virtually continuous imposition of the qualified admissions moratorium since September

1988. Currently, and for the past several months, the population of the system has exceeded the MAP of 3,750 inmates by more than thirty percent (30%).

3. As of the date of this Stipulation and Agreement, the City has engaged in site preparation activities towards the construction of a downtown detention facility, but such a facility cannot be completed to meet the December 31, 1990 deadline, and the need for a new facility or facilities capable of housing not less than 440 inmates is apparently unabated.

4. New prison construction is inadvisable without detailed consideration of the future demands to be made on the Philadelphia Prison System in light of: City population trends; trends in the crime rate; the habitability of existing prison facilities and the feasibility of their rehabilitation; the likelihood and effect of changes in the administration of criminal justice in Philadelphia; and the availability of alternatives to confinement.

5. Once the immediate and longer-range needs of the Philadelphia Prison System are determined realistically, how best to meet those needs should be addressed in a rational planning process.

6. An intelligent assessment of the needs of the Philadelphia Prison System and rational planning towards meeting those needs require the involvement of the Philadelphia judiciary, the Office of the District Attorney, and the Defender Association, all of whom will be invited and encouraged to participate in the orderly planning process established by this Stipulation and Agreement.

7. Alleviation of the existing conditions of acute overcrowding and compliance with the MAP cannot await the development and execution of plans for new construction or the renovation of existing structures.

8. Plaintiffs desire to preserve their right to seek monetary damages notwithstanding this Stipulation and Agreement.

9. The tasks required by this Stipulation and Agreement must be performed with all possible dispatch, time being of the essence.

10. By entering into this Stipulation and Agreement, none of the parties makes any admission respecting the merits of any claim or defense in this litigation, except as to those matters expressly stated in the preceding paragraphs of this Stipulation.

AGREEMENT

In light of the foregoing Stipulation and to carry out the objectives recited therein, the parties agree as follows:

11. Defendants shall conduct expeditiously the orderly planning process set forth in the document entitled "Prison Planning Process" attached as an Appendix hereto and incorporated herein by reference. Defendants shall thereafter construct or arrange for such new facilities and close or renovate existing facilities in accordance with the plans produced pursuant to the Prison Planning Process and approved by the Court.

12. In return for the defendants' undertaking set forth in Paragraph 11 above and in the succeeding paragraphs of this Agreement, the requirements contained in

Paragraph 2.e. of the December 30, 1986 Consent Order to complete construction of a 440-bed detention facility in downtown Philadelphia by December 31, 1990 shall be deemed to be superseded.

13. The Mayor of the City of Philadelphia shall appoint a Criminal Justice Project Coordinator responsible for coordinating and carrying out the activities specified in the Prison Planning Process, and such Coordinator's position shall continue to be filled throughout the implementation of the Prison Planning Process.

14. Defendants shall construct a new prison facility or facilities capable of housing in the aggregate at least 1000 inmates by May 25, 1994. Such construction shall be planned pursuant to the Prison Planning Process.

15. With respect to the capital or bond funds originally allocated for the downtown Criminal Justice Center, defendants will not seek to designate said funds for any project, except in accordance with the Court's Order of November 14, 1990.

16. Not later than April 3, 1991, defendants shall contract for and provide a minimum of 250 beds in a program or programs that provide alcohol and substance abuse rehabilitation, training and other support services. The first 25 beds shall be available on or before December 17, 1990. The beds and services provided pursuant to this Paragraph 16 shall be reserved for persons who would otherwise be committed to or retained in the custody of the Philadelphia Prisons. Defendants shall have discretion in selecting the program provider(s), but may not reduce or discontinue the provision of such programs

without Court approval. In determining whether defendants have met their obligations hereunder, beds and services being provided under contract with the City of Philadelphia as of August 31, 1990 shall not be counted.

17. In order to achieve compliance with the MAP:

a. Defendants shall designate and submit to the Special Master the names of inmates who meet the criteria of Paragraph 4.E.(i)-(iii) of the September 21, 1990 Order which provides for the release of:

(1) all persons admitted to the prisons under prior orders of the court who are still detained but who would not be admitted under the provisions of this order as now modified;

(2) prisoners held in default of the lowest amount of percentage bail as necessary to reduce the population in all institutions to the maximum allowable populations. If inmates considered for release under this paragraph are held in default of equal amounts of bail, preference shall be given to the inmate held the longest time. Persons charged with offenses enumerated in paragraphs 3A and B shall not be released pursuant to this paragraph.

b. Defendants shall submit no fewer than thirty-five (35) names per day, at least five (5) days per week, whenever the population is in excess of 3,750.

c. Defendants and the Special Master shall make use of the information and services provided by the

Prisons Population Management Unit (PPMU). Defendants shall continue to provide sufficient funding for the Prisons Population Management Unit until relieved of this obligation by the Court.

d. Concurrent with the submission to the Special Master, defendants shall provide the names of those designated and submitted to the Special Master to the District Attorney who then shall have seventy-two (72) hours to communicate in writing to the Special Master any alleged errors in application of the release criteria set forth in paragraph 17.a. *supra*, or any objections to the release of any inmate based on considerations of public safety and supported by substantial evidence.

e. The Special Master shall direct the release of all inmates who meet the criteria set forth in Paragraph 17.a. Inmates to whose release the District Attorney objects on public safety grounds shall not be released if, but only if, the District Attorney designates for release an equivalent number of inmates who are eligible for release. In the event of such designation, the Special Master shall order the release of those designated by the District Attorney. The parties stipulate that the findings of fact of the Special Master will be final. For those inmates on a list submitted by defendants whose next court dates are within two (2) weeks of the date of the list, the Special Master may post-date the release directives for the date following the next court date provided that the directive shall not apply if trial takes place as scheduled and is underway or has resulted in a conviction on that case. The Special Master's directives shall be

provided to the parties and the District Attorney by facsimile transmission or hand delivery and shall indicate the date of each release.

f. Defendants shall effectuate the releases within twenty-four (24) hours of receiving any release order pursuant to this Paragraph 17.

g. In the event that the Court or Special Master is or will be unavailable for more than two (2) consecutive business days, on account of illness, absence from Philadelphia or other reason, to participate in the release process set forth in this Paragraph 17, the Court shall designate a judicial officer to review release lists if necessary to insure and, in any event, the Court shall insure that the minimum of 175 inmates per week is considered and processed in accordance with this Paragraph.

18. The procedures set forth in Paragraph 17 of this Stipulation and Agreement shall supersede Paragraphs 4.A.-C. of the September 21, 1990 Order. Otherwise, this Stipulation and Agreement shall not affect the operation of the September 21, 1990 Order or Paragraphs 1 and 2.a-c and h-i of the remedial provisions of the Consent Order of December 30, 1986, as amended, which shall remain in full force and effect, except as they may be further amended.

19. a. Beginning five (5) days from the date of this Agreement, defendants shall be subject to those penalties defined in this Paragraph 19 for failure to comply with the requirements of Paragraph 17.a., b., c., d., and f. when the MAP for the prison system exceeds 3,750.

b. Defendants shall be assessed $100.00 per day for each inmate

(1) who is admitted into the Philadelphia Prisons in violation of the qualified admissions moratorium;

(2) who should be designated for release in accordance with Paragraph 17 but is not so designated; or

(3) who is not released after receipt of a release order pursuant to Paragraph 17.

c. Defendants shall not incur fines pursuant to Paragraph 19.b(2) if they submit to the Special Master at least thirty-five (35) names per day meeting the other requirements of Paragraph 17, even if a greater number of inmates meets the criteria set forth in Paragraph 17.a.

d. The provisions of this paragraph shall apply only on days that the MAP is exceeded, and no penalty shall be assessed with respect to the admission or custody of any inmate which is predicated on erroneous information supplied by a third party on which the defendants reasonably relied.

e. The Special Master shall monitor defendants' compliance with the qualified admissions moratorium and the defendants' exercise of the release mechanism.

20. Upon submission of each plan required by the Prison Planning Process, the Special Master shall insure that plaintiffs and the involved agencies receive copies of the materials submitted, and shall notify the plaintiffs and the involved agencies of the date by which their comments on the plan are to be submitted. Plaintiffs and the involved agencies shall have ten (10) days in which to

review and comment before the plan is forwarded to the Court with the recommendation of the Special Master. Any dispute regarding the final date for submission of comments is to be decided by the Special Master.

21. If the plaintiffs or any of the involved agencies object to the defendants' proposed plan, the parties and the involved agencies, with the assistance of the Special Master, shall attempt to resolve their differences. If the differences are not resolved within thirty (30) days of the submission of the objections, the Special Master shall submit the defendants' plan and the objections, along with the Special Master's recommendations, to the Court. Within ten (10) days of the Special Master's submission to the Court, either party may request a hearing *sua sponte*. If a hearing is not requested timely, the Special Master's findings shall be accepted as uncontested by the parties. In the absence of a request by the parties for a hearing, requests by any of the involved agencies for a hearing shall be granted on good cause shown.

22. If a plan is not submitted by its due date as established in the Prison Planning Process and set forth in Exhibit A to the Prison Planning Process, or if the plan which is submitted is determined by agreement of the parties or by the Court to fall short of substantial compliance with the requirements for such plan or to have been submitted in bad faith, defendants shall forfeit $500.00 per day for each day that no acceptable plan is submitted commencing as of the plan's due date; after thirty (30) days, the daily penalty shall be $1,000.00.

23. Once a plan is approved by the Court, defendants shall carry it out, subject to the penalties set forth

in Paragraph 27. Whenever practical, parts of each plan shall be presumed to be separable such that objection to one part of a plan shall not delay other parts that can proceed independently so long as no objection exists to those other parts.

24. The Special Master shall monitor compliance with all plans approved by the Court. The Special Master shall provide the Court with reports on compliance with all approved plans, beginning three (3) months after approval of the initial plan and at three (3) month intervals thereafter or with such other frequency or at any time as the Court may direct.

The reports will include the status of each requirement of each approved plan. The compliance status will be rated, using the following classifications:

a. The Special Master concludes that the defendants are in substantial compliance with this requirement.

b. The Special Master concludes that the defendants are in compliance with this requirement, subject to specified exceptions and/or qualifications noted in the text of the report.

c. The Special Master cannot make a finding because of insufficient evidence, unresolved ambiguity as to what actions are necessary for compliance, or a need for additional professional expertise.

d. The Special Master concludes that the defendants are not in compliance with this requirement.

25. Within ten (10) days of the Special Master's submission of a status report on compliance, either party

may request a hearing. If a hearing is not requested timely, the Special Master's findings shall be accepted as uncontested.

26. Hearings on defendants' compliance with the requirements of any plan shall be scheduled not earlier than forty (40) days from the submission of the Special Master's Preliminary Report on the status of compliance. The parties will then have fifteen (15) days to comment directly to the Special Master on the contents of the report. The Special Master will submit a Final Report to the Court and the parties within two (2) weeks of receipt of the parties' comments. The parties will then have ten (10) days in which to submit written objections to the Court regarding any remaining disagreements with the report.

The Special Master will hold a prehearing conference with the parties, following the ten (10) day period for objections and at least one (1) day prior to the compliance hearing before the Court. The report and compliance issues will be reviewed by the parties at the prehearing conference. Issues that remain in dispute will be identified and presented to the Court by the Special Master.

27. Defendants shall be subject to a penalty of $500.00 per day for each day of delay in complying with or fulfilling a plan milestone; after thirty (30) days the daily penalty shall be $1,000.00. Whether defendants have substantially complied with the requirements of any plan shall be determined by the Court upon a hearing. Defendants shall be entitled to a reasonable extension of time for unavoidable delays in complying with or fulfilling a plan milestone caused solely by causes not reasonably

foreseeable by the parties at the time of approval of the plan and which are entirely beyond the control and without the fault or negligence of the defendants. Events considered not reasonably foreseeable by the parties at the time of approval of the plan and entirely beyond the control and without the fault of negligence of the defendants shall include, but not be limited to acts of God, quarantine restrictions, general strikes throughout the relevant trades, freight embargoes not caused or participated in by defendant, fire, flood, epidemics, and weather of unusual severity.

28. Penalties forfeited by defendants shall be used or distributed as determined by the Court on the advice of the parties and the Special Master.

29. Defendants shall pay the attorneys' fees and costs incurred by plaintiffs in the negotiation and implementation of this Stipulation and Agreement, the reasonableness of said fees to be negotiated by the parties in the first instance and decided by the Court in the event of a dispute.

30. As a possible alternative or concurrent mechanism to the release mechanism provided in Paragraph 17, defendants shall formulate, for submission to the Court, other criteria and procedures for the release of inmates (*e.g.*, those inmates who are not afforded a speedy preliminary hearing, trial, or sentencing). Nothing herein is intended to restrict the Court's authority to issue contempt citations or its power under the All Writs Act.

31. Defendants state that nothing contained herein conflicts with the ongoing state court case of *Jackson v. Hendrick*. A similar Stipulation and Agreement is being

negotiated with plaintiffs' counsel in that matter and is being prepared for submission to and approval by the three-judge panel. For a period of thirty (30) days from the date of entry hereof, this Stipulation and Agreement shall be contingent on the entry of an order by the *Jackson v. Hendrick* court removing any conflicts between orders of that court and this Stipulation and Agreement. Unless defendants make a timely application to this Court to the contrary, this Stipulation and Agreement shall be effective in its entirety at the end of said thirty-day period regardless of any action or inaction by the *Jackson v. Hendrick* court.

32. The provisions of Paragraph 17 are not severable from the Agreement as a whole; if the release mechanism established by Paragraph 17 is not approved and implemented, the Agreement is without force or effect.

33. This Court shall retain jurisdiction of the parties and the cause of action to enforce the provisions of this Stipulation and Agreement notwithstanding the provisions of Paragraph 6 of the Consent Order of December 30, 1986.

34. Upon approval of this Stipulation and Agreement by the Court, plaintiffs shall withdraw their pending motion to vacate the Consent Order of December 30, 1986, as amended, without prejudice and with the right to reinstate the motion at any time. By entering into this Stipulation and Agreement, plaintiffs shall not be deemed

to have ratified any prior modifications of the Consent Order.

MARTIN HARRIS, ET AL.

By: /s/ David Richman
DAVID RICHMAN
Attorney for Plaintiffs

CITY OF PHILADELPHIA
(on behalf of all defendants)

By: /s/ Charisse R. Lillie
CHARISSE R. LILLIE
City Solicitor

APPROVED AND SO ORDERED:

_____
Shapiro, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
v.	:	
JOAN REEVES, et al.	:	NO. 82-1847

MEMORANDUM and ORDER

(Filed JAN 14 1991)

NORMA L. SHAPIRO, J. JANUARY 10, 1991

This civil rights litigation concerns overcrowded conditions in the Philadelphia County prisons. In 1986, this court denied a motion by the District Attorney to intervene in these proceedings ("Motion I"); now before the court is second motion by the District Attorney to intervene ("Motion II").

This action was brought by inmates at the Holmesburg Prison (subsequently amended to include all Philadelphia County prisoners) against, *inter alia*, the City of Philadelphia and representatives thereof ("City"). This court dismissed the action initially because of the pendency of state court litigation filed in 1971 to challenge the constitutionality of the conditions in the Philadelphia prisons. The Court of Appeals reversed the dismissal and remanded the case.

Following remand, the parties submitted a proposed consent decree on August 15, 1986. On August 19, 1986, the District Attorney filed Motion I to intervene as of right under Fed.R.Civ.P. 24(a) or, in the alternative, to intervene permissibly under Fed.R.Civ.P. 24(b).

The parties then withdrew the proposed consent decree and consulted with the District Attorney's office and others, and submitted a revised proposed consent decree on October 3, 1986. The proposed consent decree established a maximum allowable population limit and intermediate milestones for reaching that limit. The decree also required the City to seek the release of certain prisoners and imposed a moratorium on new admissions of persons charged with and convicted of certain crimes if the maximum allowable population were exceeded.

This court held three days of hearings on the proposed consent decree and on the District Attorney's motion to intervene. The District Attorney presented witnesses and introduced stipulated statements of several other persons. On December 31, 1986, this court denied the District Attorney's motion to intervene, *Harris v. Pernsley*, 113 F.R.D. 615 (E.D.Pa. 1986), and entered an order approving the consent decree, *Harris v. Pernsley*, 654 F.Supp. 1042 (E.D. Pa 1987).

The consent decree was stayed for certain periods of time (March 6 to May 15, 1987, June 9 to June 16, 1987, and July 23 to August 13, 1987) while the District Attorney appealed this court's denial of his motion to intervene as of right; on appeal, this court's decision to deny Motion I was affirmed. *Harris v. Pernsley*, 820 F.2d 592 (3rd Cir.), *cert. denied sub nom. Castille v. Harris*, 107 S.Ct. 336 (1987).

In affirming, the Court of Appeals focused on the second requirement of Rule 24(a)(2): whether the proposed intervenor "has a sufficient interest in the litigation." *Id.* at 596. The court noted that a precise definition

of the kind of interest justifying intervention remains elusive; courts have concluded that intervention will be allowed when the proposed intervenor's interest is "significantly protectable," *Donaldson v. United States*, 400 U.S. 517, 531 (1970), "legally protectable," *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984), and "direct," as opposed to contingent or remote, *Restor-A-Dent Dental Laboratories v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984).

The Court of Appeals examined the District Attorney's rights and duties to determine whether they might be directly affected by this litigation. Finding the District Attorney's statutory power limited to "the responsibility of enforcing the Commonwealth's criminal statutes," 820 F.2d at 598, the court concluded that the District Attorney had no right to intervene to oppose plaintiffs' claims of unconstitutional prison conditions because he "has no legal duties or powers with regard to the conditions in the Philadelphia prison system," *id.* at 600. It further found that the District Attorney had no right to intervene in "the formation of the terms of the settlement agreement in this case" because "none of his enumerated legal duties are taken away by the settlement approved in this case." *Ibid.* "To the extent that the ceiling on the prison population, and any resultant release of inmates, may be required to maintain constitutional conditions in the prisons, the District Attorney has no legally protected interest in causing the constitutionally-imposed maximum to be exceeded." *Id.* at 601. The court concluded:

> We must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials. But we decline to

> equate the District Attorney's function as the spokesperson for Pennsylvania's interest in criminal prosecutions with the responsibility for policing the entire criminal justice system. Although we agree with the District Attorney that the decree may result in some people not appearing for their scheduled trial dates and some individuals not having to post bond before being released, this by-product of the decree is not sufficient to give the District Attorney the right to become a party to any consent decree entered in this case.

Id. at 602.

The court approved the "objector" status this court granted to the District Attorney:

> [A]lthough the District Attorney is not entitled to intervene as of right, we think it was entirely appropriate for the district court to permit the District Attorney to be heard on the terms of the consent decree, however his status may be otherwise legally characterized. Indeed, permitting persons to appear in court, either as friends of the court or as interveners for a limited purpose, may be advisable where third parties can contribute to the court's understanding the consequences of the settlement proposed by the parties.

Id. at 603.

Despite the District Attorney's continued participation in the *Harris* proceedings, he filed a new motion to intervene in the litigation in order to challenge enforcement of any aspect of the Consent Decree relating to the release and non-admission of county prisoners. The basis for Motion II is a statute passed by the Pennsylvania

Legislature after the denial of Motion I. This statute states:

> The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

18 Pa. C.S.A. § 1108. Following the passage of that statute, seven members of the Pennsylvania House of Representatives sought a declaratory judgment that it was unconstitutional. Summary judgment in that case was granted in favor of the Commonwealth, see *Ritter v. Commonwealth*, 548 A.2d 1317 (Pa.Cmwlth. 1988), and on May 10, 1989, the Pennsylvania Supreme Court affirmed, 557 A.2d 1064. The statute became effective May 24, 1988.

The plaintiff class opposes intervention of the District Attorney for any purpose. The City would permit the District Attorney to intervene with regard to the release of prisoners, enforcement of the admissions moratorium, or formulation of an alternative mechanism to reduce the prison population to permissible levels, but prohibit him from participating in the administration, management, or operation of the prisons. The District Attorney's position is that he should be permitted to intervene only to "participate in proceedings which may affect the release or nonadmission of Philadelphia prisoners." Reiteration and

Clarification of Scope of District Attorney's Pending Motion To Intervene at 3.

Section 1108 states in conclusory terms that the District Attorney has legal standing in litigation involving the release or nonadmission of prisoners and provides that he may seek equitable relief to protect that interest. The statute fails to change the role of the District Attorney sufficiently to mandate his intervention. The considerations that were dispositive of the issue in the Court of Appeals remain unchanged: the District Attorney still has no legal duty or power regarding prison conditions or administrative responsibilities over the Philadelphia prisons; the District Attorney does not have the responsibility of overseeing Philadelphia's criminal justice system; and the District Attorney would not be not subject to liability if conditions were found to be unconstitutional in the Philadelphia prisons. Furthermore, Section 1108 does not impose any new legal duties or bestow any new powers on the District Attorney that are affected by the release and non-admission of pre-trial detainees. The statute does not purport to alter the "boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials." *Harris v. Pernsley*, 320 F.2d at 602.[1]

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[1] Considering the identical issue as that presented here, in an action concerning conditions of confinement at the Philadelphia Youth Study Center, Chief Judge Emeritus Joseph S. Lord, III, concluded that the District Attorney's motion to intervene "although superficially appealing . . . lacks merit."

(Continued on following page)

The bill's legislative history suggests that the Commonwealth intended to overturn the decision of the Court of Appeals on the District Attorney's original motion to intervene without substantively altering the District Attorney's responsibilities. During the debate, Representative Wogan, the sponsor of the bill stated:

> This is a commonsense [sic] amendment. It is reasonable to assume that our D.A.'s, who, it is already recognized, have the power to advocate criminal sentences, the power to defend convictions in both State court actions and Federal habeas corpus actions and the power to represent the Commonwealth generally in challenges of the constitutionality of the State's penal statutes, should also have the authority to intervene in lawsuits involving the release of county prisoners.

1987 Legislative Journal – House, Vol. III, at 1951.

The legislature could have granted new legal duties or responsibilities to the District Attorney that might be directly affected by the continued application of the

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(Continued from previous page)

See Santiago v. City of Philadelphia, No. 74-2589, slip op. at 5 (E.D.Pa. April 4, 1990). In Judge Lord's view,

> section 1108 cannot be said to create any legitimate rights or duties; it simply states * * * that a district attorney has an interest in litigation that may involve the release or nonadmission of prisoners * * * .

Id. at 6. Although the opinion and order were later vacated by an emergency judge, the court believes Judge Lord's reasoning and conclusion were correct.

release and non-admissions provisions of the decree.[2] However, the court does not believe that the Pennsylvania legislature has in fact changed the District Attorney's responsibilities or given him a "legal interest" in the *Harris* litigation within the meaning of Rule 24 as interpreted by the Court of Appeals.[3]

This motion was filed promptly after the effective date of Section 1108. Even though that statute failed to give the District Attorney any new legal interest, the District Attorney acted timely in testing the effect of the new statute on his right to intervene in this case.

The statute's effective date was May 24, 1988, and this motion was filed on May 27, 1988. The motion was not ripe for decision while the constitutionality of Section 1108 was the subject of serious challenge in state court. The Pennsylvania Supreme Court affirmed the Commonwealth Court's determination that Section 1108 was constitutional on May 10, 1989. Since that date, the court's failure to decide this motion has deprived the District

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[2] The court expresses no opinion at this time as to whether such action by the Legislature would apply retroactively and entitle the District Attorney to intervene in this case.

[3] On June 3, 1988, the District Attorney moved to stay the implementation of the qualified admission moratorium. In denying the stay, this court found that "while the state legislature cannot create an interest after the fact, the continuing nature of the equitable relief provided for suggests the likelihood the District Attorney will be successful in some form of limited intervention." Memorandum of June 6, 1988, slip op. at 4. Nothing in today's decision contradicts the court's previous statement. The District Attorney has, and will continue to enjoy "some form of limited intervention" in his official status as an "objector."

Attorney of the right to another appellate review. But in no other respect has the District Attorney been prejudiced in this litigation by the court's inaction. The District Attorney has had, and will continue to have, notice and an opportunity to be heard on all matters concerning the release and non-admission of Philadelphia prisoners. Indeed, the court has modified the release mechanism to give the District Attorney the opportunity to submit written objections to the release of specific prisoners to the Special Master and the judge. The District Attorney also has been given full opportunity to participate, through both written and oral submissions to the court, in numerous proceedings concerning the modification of the release mechanism or admissions moratorium in conference with the Special Master and in hearings before the court. Indeed, the admissions moratorium has been modified on four occasions, July 13, 1988, July 29, 1988, September 9, 1988, and November 8, 1988, at the request of the District Attorney.

Under the new Stipulation and Agreement (if it is approved following a hearing at which the District Attorney will have the opportunity to be heard), the District Attorney will continue to be accorded the status of "objector" and in that capacity may continue to provide the court with information on issues he deems relevant to the court's remedial efforts and participate in all proceedings which may affect the release or nonadmission of Philadelphia prisoners as he has requested.

For the reasons stated, and the reasons in the court's opinion denying the District Attorney's original motion to intervene, later affirmed on appeal, the District Attorney's motion is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
	:	
v.	:	NO. 82-1847
JOAN REEVES, et al.	:	

ORDER

AND NOW, this 10th day of January, 1991, upon consideration of the District Attorney's motion to intervene, plaintiffs' response, the municipal defendants' response, and the District Attorney's reply and supplemental brief, and following oral argument on the motion, it is ORDERED that the motion is DENIED.

/s/ Norma L. Shapiro
NORMA L. SHAPIRO J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, JESSE KITHCART, JONATHAN LEWIS, ROY COLD, CAROL RANSOME, JOHN CUMMINGS, RAYMOND WHITTINGTON, and DERRICK JONES	:	CIVIL ACTION
v.	:	
JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison System, WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison, PRESS GROOMS, in his official capacity as Warden of the Detention Center, HARRY MOORE, in his official capacity as Warden of the House of Corrections, JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia, HON. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia, and THE CITY OF PHILADELPHIA	:	NO. 82-1847

ORDER

(Filed Mar. 11, 1991)

WHEREAS, the court has considered the Memorandum of Law in Support of Approval of the Stipulation and Agreement of counsel for the plaintiff class; and

WHEREAS, the court has considered the Objections of District Attorney, Ronald D. Castille, to Proposed Consent Decree, testimony in support of the Objections offered at the hearing on January 14, 1991, Ronald D. Castille's Offers of Proof In Support of Objections to the Court's Ruling That The District Attorney May Not Present Evidence, and the City Defendants' Response to Objections of Ronald D. Castille to Proposed Consent Decree; and

WHEREAS, the court has considered statements by counsel for the plaintiff class and counsel for the City Defendants at the hearing on January 14, 1991, in support of the Stipulation and Agreement; and

WHEREAS, the court has considered the testimony of a class representative in favor of the Stipulation and Agreement and petitions of members of the plaintiff class in opposition to the Stipulation and Agreement submitted prior to the hearing on January 14, 1991; and

WHEREAS, the court has considered the testimony of three class representatives at a hearing on February 26, 1991, that they and the class, after receiving from counsel further explanations and assurances regarding the likely impact of the Stipulation and Agreement, had rescinded their opposition and supported approval of the Stipulation and Agreement, and

WHEREAS, the court on March 7, 1991, received petitions containing 1,296 signatures from members of the plaintiff class in support of the Stipulation and Agreement;

THE COURT ORDERS THAT:

1) The Stipulation and Agreement filed with the court on December 20, 1990, and preliminarily approved by court order of December 28, 1990, is hereby approved, and shall be effective and implemented in accordance with its terms. An opinion stating the Court's reasons for approval will follow.

2) The Special Master shall arrange a meeting with the *Jackson v. Hendrick* court to discuss the coordination of proceedings, financial obligations and utilization of any fines imposed hereunder; attendance of administrative judges would be welcome.

3) Pursuant to the City's obligation under Paragraph 15 of the Stipulation and Agreement, the City shall submit to the court through its Special Master, a report on all funds expended or committed for a new prison facility or facilities and a Downtown Criminal Justice Center, and the source or sources thereof, on a monthly basis.

4) No capital or Criminal Justice Refunding Revenue Bond funds shall be committed for any purpose without 30 days notice to the court in order to ensure continued secure funding for the City's obligations under the Stipulation and agreement approved as an Order of the court.

5) The court Order of November 14, 1990, including but not limited to Paragraphs 4 and 5 thereof, remains in

full force and effect in accordance with the provisions of the Stipulation and Agreement approved as an Order of the court.

6) The court will appoint an independent financial consultant when and as necessary to ascertain the continued availability of City resources for the implementation of the City's obligations hereunder; all City financial records shall be made available on request for said purposes.

BY THE COURT:

/s/ Norma L. Shapiro

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1068 and 91-1194

MARTIN HARRIS,
JESSE KITHCART,
JONATHAN LEWIS,
ROY COLD,
CAROL RANSOME,
JOHN CUMMINGS,
RAYMOND WHITTINGTON, and
DERRICK JONES

v.

JOAN REEVES, in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia; REV. ALBERT F. CAMPBELL, LABORA M. BENNETT, JAMES D. BARBER, ALLEN M. HORNBLUM, M. MARK MENDEL, DONALD J. PADOVA, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System; J. PATRICK GALLAGHER, in his official capacity as Superintendent of the Philadelphia Prison System; WILLIE GRAY, in his official capacity as Warden for Holmesburg Prison; PRESS GROOMS, in his official capacity as Warden of the Detention Center; HARRY MOORE, in his official capacity as Warden of the House of Corrections; JAMES S. WHITE, in his official capacity as Managing Director in the City of Philadelphia; HON. W. WILSON GOODE, in his official capacity as Mayor of the City of Philadelphia; and THE CITY OF PHILADELPHIA

LYNN ABRAHAM, District Attorney of Philadelphia County, Proposed Intervenor.

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-1847)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and ALDISERT, *Circuit Judges*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Morton Greenberg
Circuit Judge

DATED: October 31, 1991

DIRECTLY PERTINENT STATUTES AND RULES

Federal Rule of Civil Procedure 24(a) and (b)

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Pa. Stat. Ann. tit. 18, § 1108

§ 1108. District attorneys' standing and interest in prisoner litigation

The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

1988, March 25, P.L. 262, No. 31, § 2, effective in 60 days.

Amend Title, page 1, line 3, by inserting after "CASES;" providing for district attorneys standing and interest in prisoner litigation;

Amend Sec. 1, page 5, by inserting between lines 7 and 8

Section 2. Title 18 is amended by adding a section to read:

§ 1108. District attorneys' standing and interest in prisoner litigation.

The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

Amend Sec. 2, page 5, line 8, by striking out "2" and inserting

3

Amend Sec. 3, page 12, line 9, by striking out "3" and inserting

4

Amend Sec. 4, page 12, line 24, by striking out "4" and inserting

5

Amend Sec. 5, page 13, line 12, by striking out "5" and inserting

6

Amend Sec. 6, page 13, line 23, by striking out "6" and inserting

7

Amend Sec. 6, page 13, line 24, by striking out "3" and inserting

4

On the question,

Will the House agree to the amendments?

The SPEAKER pro tempore. The Chair recognizes the gentleman from Philadelphia, Mr. Wogan.

MR. WOGAN. Thank you, Mr. Speaker.

I think a brief history relating to the underlying issue herein may be in order. Many of us are probably aware that as a result of a civil rights lawsuit brought by 10 Philadelphia County prisoners in 1982, the city of Philadelphia has entered into a consent decree, that is to say, it has agreed with the county prisoners' lawyers, that Philadelphia's prison population should be reduced from its present approximate level of 4,150 or 4,200 prisoners to a cap of 3,750. The wisdom of reaching this agreement on the part of the city has probably opened the question,

since as of January 4, 1988, Philadelphia's prisons will no longer accept large categories of prisoners, including those charged with narcotics offenses and those charged with crimes like involuntary sexual intercourse and child abuse.

The D.A. of Philadelphia County has not been permitted to intervene at any stage in this lawsuit; that is to say, he has not even been permitted to make any substantive argument, legal or otherwise, concerning the wisdom of the release of these potentially dangerous convicted criminals.

This amendment will therefore take the invitation of the U.S. Federal District Court for the Eastern District of Pennsylvania and further define the rights and duties and obligations of the district attorneys of our State by clearly enunciating that D.A.'s will not only have the legal responsibility of enforcing the Commonwealth's criminal statutes but they will also have a legal interest in any proceeding regarding the release or nonadmission of county prisoners.

Mr. Speaker, this is a commonsense amendment. It is reasonable to assume that our D.A.'s, who, it is already recognized, have the power to advocate criminal sentences, the power to defend convictions in both State court actions and Federal habeas corpus actions, and the power to represent the Commonwealth generally in challenges of the constitutionality of the State's penal statutes, should also have the authority to intervene in lawsuits involving the release of county prisoners.

It is important to note that this amendment, which happens to have the support of the Pennsylvania District

Attorney's Association, need not necessarily change the results in any civil rights lawsuits brought by county prisoners; it only gives each county D.A. the right to submit briefs and make arguments in those cases.

I ask for your support.

The SPEAKER pro tempore. On the Wogan amendment, the Chair recognizes the gentleman from Delaware, Mr. Freind.

MR. FREIND. Thank you, Mr. Speaker.

I rise to support the Wogan amendment. I do it for two reasons.

My first concern with any amendment to this bill is whether or not it would impact upon the possibility of its passage in the Senate and being signed into law by the Governor, since I and many members feel that the first priority here is to pass the prolife legislation. From every indication that we have received, this in no way will jeopardize the bill in the Senate or with the Governor's Office.

Secondly, the Wogan amendment is a commonsense, needed amendment. All it permits is the district attorney of any county to have standing and he is the chief law enforcement officer – to have standing in any lawsuit which is determining prison population. Unfortunately, the mayor of Philadelphia entered into a consent decree with the Federal district judge. If in fact that consent decree holds up, what we will see on or about January 4, unfortunately, are a number of criminals being released, presenting a clear and present danger to the law-abiding members of society.

Passing this amendment does not automatically mean it will change. It would permit the district attorney, however, to have standing, to argue the constitutionality of that consent decree, and, hopefully, to obtain a restraining order so in fact this does not happen. Right now, without this amendment, the way the city is dealing with this problem is using funds to pay for bail for people arrested, which I find somewhat ironic.

It is a good amendment; it is a needed amendment; and in no way, in my opinion, will it jeopardize the abortion section of this bill. I hope that we can support it.

The SPEAKER pro tempore. On the Wogan amendment, the Chair recognizes the gentleman from Philadelphia, Mr. Evans.

Mr. EVANS. Mr. Speaker, under normal circumstances I would generally think that this would be a good amendment. However, I do not believe that the intent of the sponsor of this amendment is serious about dealing with the problem, particularly in the district that I represent in the city of Philadelphia. I believe that this amendment strictly is a political amendment, that the district attorney in the city of Philadelphia has had numerous opportunities to have input into that process, that the city solicitor of the city of Philadelphia has allowed the district attorney to express his opinion. However, clearly the courts have found fit that the district attorney does not have any standing in the prison litigation case. I find that all of a sudden it is relatively strange that my colleague would suddenly want to say that the district attorney should have some involvement in this particular situation when clearly the Federal court has said that the district

attorney does not have any standing, as well as the United States Supreme Court, which has indicated that the district attorney does not have any standing. And as far as murderers, rapists, and other individuals being freed, that is absolutely not the truth.

Just a few minutes ago, Mr. Speaker, I attempted to have the district attorney's office in the city of Philadelphia and the city solicitor's office talk about this particular problem, and the city solicitor's office expressed that even if they wanted to compromise and work out a solution, that they would not be in the position to resolve this problem, that this problem could only be resolved by Federal court.

I do not believe that this will relieve the prison overcrowding problem in the city of Philadelphia. I believe that the decision, when we talk about prison overcrowding, should be left with the executive branch. It should be left with those individuals who have the responsibility of raising taxes and building prisons. I do not believe that a district attorney in any part of this State would be working in the interests of dealing with taxpayers' dollars.

I am saying to you today that it is something that all of us as legislators should closely look at, that we should not give up this role and responsibility that we have to oversee this. Yes, I do think the district attorney should have something to say about the types of prisoners that are released, but I do not believe, when it comes down to building more prisons or setting policies about more cells, that the district attorney should have anything to

say about that particular decision. That, in my opinion, is for the county commissioners and the chief executive.

In the city of Philadelphia there has been an attempt to resolve this particular problem. They have up until January 4, 1988, before they go back to Federal court to relieve this particular problem. This amendment, in my view, again is an invasion and will not attempt to deal with the real problem in terms of prison overcrowding. That is the real issue. The real issue is, how do we go about dealing with the question of the number of people that are in our prisons today?

So I would ask my colleagues to closely look at again another role, another layer of bureaucracy that we are setting in terms of our local governments. Again I would ask my colleagues to oppose the Wogan amendment.

The SPEAKER pro tempore. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Philadelphia, Mr. Wogan, for the second time.

Mr. WOGAN. Thank you, Mr. Speaker.

Mr. Speaker, I will yield my time if there is another – I guess not.

Mr. Speaker, I think the gentleman, my colleague from Philadelphia, is completely wrong. This is not a political amendment. I am not being political in my motivation. Perhaps what the gentleman says would have had some merit maybe last month before the election, but my motives are not political. The time to act is now, because we in Philadelphia are laboring under a January 4 deadline. We will not have another opportunity to

address this issue. I cannot imagine anyone in this chamber not wanting to allow their local district attorney to have some say in the release of the prisoners in his or her own county. That is all this amendment does. It is very, very simple, and again I ask for your support.

The SPEAKER pro tempore. The Chair recognizes the gentleman from Philadelphia, Mr. Linton.

Mr. LINTON. Thank you, Mr. Speaker.

Mr. Speaker, I rise to oppose the Wogan amendment. I think what we have here, which has been properly described by Representative Evans, is a political problem. But even beyond that, Mr. Speaker, what we are attempting to do here is to involve this House, the members of this House, in a decision that has been granted by the court.

There has, in fact, been a consent decree entered into by the court to deal with the overcrowding problem in the city of Philadelphia's prisons, and because of that consent decree, there have been efforts put forth by all bodies to deal with the problem of overcrowding. This consent decree has come about because the political bodies – the judges, the district attorneys, and others – have not been able to come to any procedures to adequately deal with the problem of prison overcrowding. So what the court has now said is, we have now entered into the picture; we have now issued a consent decree; these are some guidelines that we are trying to establish to deal with the problem of overcrowding. What Mr. Wogan is now saying to the members of this House is, now, House

of Representatives of the Commonwealth of Pennsylvania, I want to involve you in that decision, and that is what the Wogan amendment now seeks to do.

I am suggesting that we get on about the business of the rest of the matters that are before us and reject the Wogan amendment. Thank you, Mr. Speaker.

The SPEAKER pro tempore. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Philadelphia, Mr. Kosinksi.

Mr. KOSINSKI. Thank you, Mr. Speaker.

I rise in favor of the Wogan amendment. Let us separate a number of arguments we have heard right now and look at the facts. I had served for 5 years prior to becoming a member of this august body as a person who was employed by the court system in Philadelphia, who worked with people who were detained prior to trial. It is the crux of the matter here, dealing with such detainees.

Right now you have two parties in the suit – you have the city and you have the detainees. The city's interests may not necessarily reflect the interests of my constituents. The city may be under a Federal court order here. They have entered into the consent decree. They are concerned with the financial aspects of the court ruling, so naturally they are going to cave in to pressure from the other side.

I find myself in a very weird political situation right now, if you want to let politics enter into this – a Democratic legislator trying to help a Republic D.A. get standing. But let us look beyond, let us look beyond the

partisan politics here. The crux of the issue is dangerous criminals will be let out on the street and the district attorney stands to try to protect the citizenry of Philadelphia and Pennsylvania from being subjected to these people coming out on the street again, and they are dangerous criminals.

I think the Wogan amendment is rational. I feel that the D.A. does deserve standing in this particular case to allow the citizenry of Philadelphia to be protected against these dangerous people. Thank you.

The SPEAKER pro tempore. The Chair now recognizes the gentleman from Philadelphia, Mr. Fattah.

Mr. FATTAH. Mr. speaker, can I ask that the cosponsor of this amendment, Mr. Kosinski, please stand for brief interrogation?

Mr. KOSINSKI. I am ready, Mr. Speaker.

The SPEAKER pro tempore. Mr. Kosinski indicates that he will stand for interrogation. The gentleman is in order and may proceed.

Mr. FATTAH. Mr. Speaker, you suggested to us that for some time period prior to your being a member of this distinguished body, you worked for the court system of the city of Philadelphia. Could you tell us in what capacity you did that?

Mr. KOSINSKI. I worked a number of different positions. My last position was court administrator, pretrial services, court bail program, court of common pleas, Philadelphia, Pennsylvania.

Mr. FATTAH. All right. The heart of this matter is related to the issue of people who have been arrested, who are awaiting trial in the city of Philadelphia, and who are detained, and in your role in the bail office there you came in contact with such people. Is that correct?

Mr. KOSINSKI. That is correct. Mainly you would have three types of detentioners: one whose crimes were minor and whose bail was a money bail, and usually they would get out on what they call released on recognizance or a small bail amount. The second was where the detainee had some type of drug, alcohol, psychiatric, or environmental problem. They would get out on conditional release. You also had a third list that was court ordered, called Jackson vs. Hendricks cases. That was the name of the court case which originally started the prison overcrowding issue in Philadelphia, and it is basically these Jackson vs. Hendricks detainees – it is now under a new name; I forget the name of the new case – but it is these detainees that many times were dangerous criminals who were arrested on a variety of charges, who had past bad records, who had past failures to appear, who had no verifiable address. So they were the problem people of the system. These are the problem people that this current consent decree is letting out, and that is why I think the Wogan amendment is very simply a reasonable solution to this situation.

Mr. FATTAH. Mr. Speaker, in your role, then, did you in fact come across people who were detained because of their economic status, and the crimes that were being alleged against them were either victimless or minor in nature?

MR. KOSINSKI. Usually in a situation like that they were not Jackson vs. Hendricks cases. They were of the minor variety, and those people usually would get out rather fast.

Mr. FATTAH. Are there people in the Philadelphia prisons –

Mr. KOSINSKI. Excuse me, Mr. Speaker, I want to finish the answer. There is a comprehensive system for tracking such type people that you mentioned, and those people were tracked and they were followed up upon. It was only the ones who would give us many problems as far as prior failures to appear, prior record of the type of crime they committed who would actually be detained.

Mr. FATTAH. Are there people, from your knowledge, who are incarcerated in Philadelphia prisons awaiting trial that for a matter of $100 or $200 would be out on the street today?

Mr. KOSINSKI. If they have a verifiable address and good family contacts and no prior failures to appear in court, there should not be that many people left in. In fact, they were the prime candidates that our program would try to get out.

Mr. FATTAH. Mr. Speaker, so you are suggesting that there are no people who are in prison today awaiting trial in the city of Philadelphia for victimless crimes who are there because they do not have $100 or $200 to post bail?

Mr. KOSINSKI. First I dispute the term "victimless crime," because every crime ultimately has a victim.

Mr. FATTAH. Okay, I am sorry. Let us remove that –

Mr. KOSINSKI. The victims are the people of the Commonwealth of Pennsylvania.

Mr. FATTAH. Would you respond to the rest of the question then?

Mr. KOSINSKI. The rest of the question is, under the system that I worked in, and it could have changed in the 5 years that I left, it was very unlikely that such people – if it was a small bail amount, if it was not a serious crime, if they had a verifiable address, and if they had no prior record of failures to appear for court – those people should be out.

Mr. FATTAH. Mr. Speaker, you have been somewhat evasive, which is not your normal tact on the floor. Let me try one last time.

You are both a practicing lawyer in the city of Philadelphia and you are a legislator with a great deal of constituents, plus you bring to bear on this deliberation some intimate knowledge about how the system works. Can you share with your colleagues whether or not there are people incarcerated in Philadelphia prisons who have not been convicted of any crimes and who are being charged with crimes that are not violent crimes, who would be on the street today not costing the taxpayers of this State and of that city money to incarcerate them if they had $100 or $200?

Mr. KOSINSKI. For the third time, Mr. Speaker, again I am going to set the criteria, and it is important here. The types of crimes you are talking about, minor crimes where the bail amount was a small bail amount, if the person had no prior failures to appear, if they had a

verifiable address to go back to, if their prior record was not a bad record, those people should be out on the streets. That is why the court bail program that I worked for was created, in order to reduce prison overcrowding. What I am trying to say in my speech today is that the people who are being let out now are not those types of people. The types of people that are being let out now are very serious problems, repeat offenders who are being detained for serious crimes. And I have answered your question three times. The people that you are talking about do not fall through the cracks of the system. The court bail program was very efficient in getting those people released.

Mr. FATTAH. Mr. Speaker, you are aware that the ROR (released on recognizance) release program that you are speaking of can only take place with the judge's permission. Is that correct?

Mr. KOSINSKI. Yes, and what would happen is on a daily basis, Mr. Speaker, the court bail program would prepare a petition to go up in front of a judge, sometimes as many as 20 a day for the people who fall between the cracks. What they would do is review the paperwork as it came in from the police administration building and then in reviewing the paperwork –

Mr. FATTAH. Only at the judge's discretion, right?

Mr. KOSINSKI. Let me finish. Let me finish.

– would review the paperwork, present a petition to the judge, and the judge usually would let them go in a major percentage of the cases. The only time the judge would not let them go, usually if there was no verifiable

address to go back to, again, failures to appear for court, or if he thought that the crime was of such a nature where the complaining witness may be in trouble or may be apprehensive if the defendant was released.

Mr. FATTAH. Okay.

Mr. Speaker, in terms of the consent decree that is being discussed now that this amendment seeks to provide standing to for the district attorney, that is in Federal court. Is that not correct?

Mr. KOSINSKI. I am sorry, Mr. Speaker. I did not hear the last part of your statement.

Mr. FATTAH. The pending court matter – that is, the consent decree that the city and the plaintiff have come to terms on in terms of the overcrowding issue – is that a matter before the Federal court?

Mr. KOSINSKI. Yes; it is, Mr. Speaker.

Mr. FATTAH. Okay. And is that a matter that the district attorney has sought standing in?

Mr. KOSINSKI. Yes; he did, Mr. Speaker.

Mr. FATTAH. And has he been denied standing?

Mr. KOSINSKI. He was denied standing because the laws of the State of Pennsylvania, which the Federal courts use to determine standing in Federal court in a case like this, do not allow the district attorney to have standing. This is why the Wogan amendment is necessary, to give the district attorney standing.

Mr. FATTAH. And was his denial of standing taken up on appeals all the way to the United States Supreme Court?

Mr. KOSINSKI. I am unaware how far it was taken, but I do know that a legislative remedy is necessary in order for the district attorney to get standing.

Mr. FATTAH. What would be the result of our giving the district attorney standing if this amendment would pass? What would be the result on the consent decree that has been signed at this point?

Mr. KOSINSKI. The Federal court may then allow the district attorney to come in to challenge the consent decree. Again, that is a matter that would be, that would be in dispute here and would have to be settled by the Federal court.

Mr. FATTAH. All right. And if, in fact, that consent decree was disrupted and people who were going to be released are not released, what burden and whose financial burden would their placement be? Would the city of Philadelphia have to continue to financially be responsible for their imprisonment while they await trial?

Mr. KOSINSKI. The city of Philadelphia will always be financially responsible for detainees.

Mr. FATTAH. Okay.

Mr. KOSINSKI. As long as they are in custody.

Mr. FATTAH. Mr. Speaker, do you know what the present cost of incarcerating a person is in the Philadelphia prisons?

Mr. KOSINSKI. I am unaware of that, Mr. Speaker.

Mr. FATTAH. Okay. And as it relates to that cost, then you do not think that there should be any financial consideration in terms of people who have been involved in minor crimes, who are awaiting trial, trials that could take up to, as you are aware, 180 days or so, that if they can be released for some small amount of bail under the present consent decree, you do not generally agree with that consent decree. Is that correct?

Mr. KOSINSKI. If the crime is not violent, if it is a small amount of bail, if there is a definite address the person is going back to that can be verified, if the person has no prior record as far as contact with the criminal system, or if that person has no prior failure to appear for court, I would say there is no problem with releasing that person on recognizance, which is what happens in most cases. But it is where there is a violent criminal with a prior record of violent crime involved, and many of these detainees that we are discussing that are at issue today, that is whom we are talking about. Those are the people that we are having the problem with.

Mr. FATTAH. Well, then, can you tell us where in the consent decree it talks about the release of violent criminals?

Mr. KOSINSKI. If you would look at the nature of the crimes committed by such detainees, that is precisely what we are talking about, Mr. Speaker.

Mr. FATTAH. Are you suggesting that in the consent decree there are in fact provisions to release violent criminals?

Mr. KOSINSKI. What I am concerned with, Mr. Speaker, is the fact that violent criminals, if they are detained – if they have a record of failure to appear, of violent crimes, and a history of recidivism – should be detained prior to trial.

Mr. FATTAH. Irrespective of their constitutional right to bail? Irrespective of their constitutional right to bail?

Mr. KOSINSKI. I think the Constitution is very clear on that, that if bail is not excessive and if bail is reasonably set, they are constitutionally detained.

Mr. FATTAH. So are you saying to the House that in the present consent decree, it allows for violent criminals to be released? Is that what you are suggesting to us?

Mr. KOSINSKI. If, if –

Mr. FATTAH. Is that in the consent decree?

Mr. KOSINSKI. If any detainee can meet the bail, they can be released. It is where the bail is reasonable, depending on the type of crime and the type of record and if the person failed to appear. If bail is high and it is reasonable for those situations, if the person cannot meet the bail, they should sit until their trial.

Mr. FATTAH. Is there something in the consent decree that allows violent criminals to be – Have you read the consent decree?

Mr. KOSINSKI. Let us face it, Mr. Speaker. The people we are talking about in the consent decree mainly are violent criminals. If you knew something about the system – and I would ask the Representative to look into the records of the court bail program, to go down there and

see what type of work they do – we are talking about the bottom of the barrel here in the people going to be released. We are not talking about the minor-type crime with no prior contact and a good record of appearances; we are talking about the bottom of the barrel – violent criminal, repeat offender.

Mr. FATTAH. Thank you, Mr. Speaker.

May I make a comment on the amendment?

The SPEAKER pro tempore. The gentleman is in order and may proceed.

Mr. FATTAH. I think that this House has been misinformed with several inaccuracies as to what the issue is here, but I think that because of the unwillingness of members to have to even really care about the nature of this issue, that perhaps this amendment will pass. But the reality is that in the city of Philadelphia there is a problem with prison overcrowding.

There is, perhaps as in all cases with big cities, a large amount of poor people who live in the city of Philadelphia who from time to time come in contact with the law in very minor crimes that they have been charged with and, while they are awaiting trial and cannot meet bail, in some cases bail under $100, are being housed in prisons at a cost of $30,000 to $40,000 a year to the taxpayers of the city of Philadelphia to house these people when in fact if they were released and awaiting trial, they may be found innocent, or even if found guilty, may be placed on probation.

So I do not believe that there is any suggestion in the consent decree that violent criminals would be released,

and I think that no matter what may happen, whether we give the district attorney standing or not, that it really will not affect the consent decree as it has been written at this point. But I thank the members for their indulgence on this matter. Thank you.

The SPEAKER pro tempore. The Chair recognizes the gentleman from Luzerne, Mr. Blaum.

Mr. BLAUM. Thank you, Mr. Speaker.

Mr. Speaker, I cannot believe that we are even debating this amendment. All this amendment does is give the district attorneys some right to comment on the types of prisoners who are being released.

We have in this country and in this State some misguided judges who would either like us to spend millions more, which we do not have, to build yet additional prisons or they want to order the release of criminals back out to our society. What this amendment does is merely give the district attorneys the right to comment, just to comment, on what types of prisoners are being released. We have not had this problem yet in Luzerne County, but if we do, I want our new district attorney, Corry Stevens, to be able to comment on whether or not a certain type of prisoner should be released into the people of our county.

I ask for an affirmative vote on the Wogan amendment.

The SPEAKER pro tempore. The Chair recognizes the gentleman from Philadelphia, Mr. O'Brien.

Mr. O'BRIEN. Thank you, Mr. Speaker.

Mr. Speaker, I think it is important that the members of this House know that there has never been a question of constitutionality, that the prisoners' rights have been violated. This was an agreement that was arbitrarily agreed to by the city with the prisoners. They made this agreement. They went to Federal court and had it ratified. Judge Shapiro, in her opinion, almost invited the State to give the district attorney standing in this because she felt that the law, State law, was silent on this issue.

In reference to the economic status of prisoners, that is not an issue. There are provisions, as Representative Kosinski pointed out, for the bail of nonviolent offenders to be reviewed several times. What we are talking about here, Mr. Speaker, are violent offenders. The list of 1,200 people who are eligible under this consent decree are rapists, murderers – Of the first 200 that were reviewed by the D.A.'s office, there was only one simple assault, and that individual was previously convicted of murder and two aggravated assaults.

I ask, Mr. Speaker, that you understand that this is a very important issue and that what we are asking is for the district attorney to have standing and to have some say on what criminals are to be released, if any. Thank you.

The SPEAKER pro tempore. On the Wogan amendment, the Chair recognizes the gentleman from Dauphin, Mr. Piccola.

Mr. PICCOLA. Thank you, Mr. Speaker.

To many in the House this may seem like a Philadelphia issue, and I would like to point out to those of us

who are not from Philadelphia that this issue pertains to all of us and could potentially affect every one of you in each of your counties. While there is currently an ongoing case in Philadelphia, it is quite likely and quite possible that you could be faced with the same kind of case in any of your counties that face an overcrowding situation. It only takes one class action by a prisoner against the county to make the situation that exists in Philadelphia exist in your county. All this amendment does is simply give the district attorney standing to go into the case and make a point, an argument, file a brief on behalf of his constituents, I believe – the victims and the citizens of the county that he is elected to protect.

The class action suits are typically brought against the county commissioners – in this case, the city of Philadelphia – and they are faced with the economic and the taxing problems that they have in maintaining a certain level of millage in their particular areas. What we want here is the ability for the other interests of the taxpayers, the protection of the citizens, to be represented in the filing of a brief by the district attorney. It is simply that and nothing more, and I urge that the House adopt the amendment.

On the question recurring,

Will the House agree to the amendments?

The following roll call was recorded:

YEAS – 175

Angstadt	Dietterick	LaGrotta	Reinard
Argall	Distler	Langtry	Ritter

Arty
Baldwin
Barley
Battisto
Belardi
Belfanti
Billow
Birmelin
Black
Blaum
Book
Bowley
Bowser
Boyes
Brandt
Broujos
Bunt
Burd
Burns
Bush
Caltagirone
Cappabianca
Carlson
Cawley
Cessar
Chadwick
Civera
Clark
Clyner
Cohen
Colafella
Cole
Cornell
Corrigan
Cowell
Coy
DeLuca
Dombrowski
Donatucci
Dorr
Duffy
Durham
Fargo
Farmer
Fee
Fischer
Flick
Foster
Fox
Freeman
Freind
Gallen
Gamble
Gannon
Geist
George
Gladock
Godshall
Gruitza
Gruppo
Hagarty
Haluska
Hasay
Hayes
Heckler
Herman
Hershey
Hess
Howlett
Hutchinson
Jackson
Jadlowiec
Jarolin
Johnson
Lashinger
Laughlin
Leh
Lescovitz
Letterman
Levdansky
Livengood
Lloyd
Lucyk
McCall
McClatchy
McHale
McVerry
Maiale
Maine
Manderino
Manmiller
Markosek
Mayernik
Merry
Michlovic
Miller
Moehlmann
Morris
Mowery
Mrkonic
Murphy
Nahill
Noye
O'Brien
Olasz
Perzel
Petrarca
Petrone
Phillips
Piccola
Pievsky
Robbins
Rudy
Ryan
Rybak
Saloom
Saurman
Schuler
Semmel
Serafini
Seventy
Showers
Sirianni
Smith, B.
Smith, S. H.
Snyder, D. W.
Snyder, G.
Staback
Stairs
Steighner
Stevens
Stuban
Sweet
Taylor, E. Z.
Taylor, F.
Taylor, J.
Telek
Tigue
Trello
Van Horne
Veon
Vroon
Wambach
Wass
Weston
Wilson
Wogan
Wozniak

DeVerter	Kasunic	Pitts	Wright, D. R.
Daley	Kennedy	Pressmann	Wright, J. L.
Davies	Kenney	Punt	Wright, R. C.
Dawida	Kosinski	Raymond	Yandrisevits
Dempsey	Kukovich	Reber	

NAYS – 22

Acosta	Harper	Linton	Richardson
Bortner	Hayden	Melio	Rieger
Carn	Hughes	O'Donnell	Roebuck
DeWeese	Itkin	Oliver	Truman
Evans	Josephs	Preston	Wiggins
Fattah	Kitchen		

NOT VOTING – 1

Pistella

EXCUSED – 5

Dininni	Micozzie	Irvis,
Honaman	Scheetz	Speaker

The question was determined in the affirmative, and the amendments were agreed to:

* * *

SALVATORE AMENDMENT

Senator SALVATORE, by unanimous consent, offered the following amendment No. A0754:

Amend Title, page 1, line 2, by inserting after "Statutes.": providing for the rights of a district Attorney in litigation involving prisoners;

Amend Sec. 1, page 1, line 6, by striking out "Sections 1101, 6307, 6308, 6309 and 6310" and inserting: Section 1101

Amend Sec. 1, page 1, line 7, by striking out "are" and inserting; is

Amend Bill, page 2, by inserting between lines 13 and 14;

Section 2. Title 18 is amended by adding a section to read:

§ 1108. District Attorneys' standing and interest in prisoner litigation.

The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody. In addition to the district attorney's rights in such a proceeding, the district attorney may seek any equitable relief necessary to protect the district attorney's interest in the continued institutional custody and admission of county prisoners, delinquents or detainees.

Section 3. Sections 6307, 6308, 6309 and 6310 of Title 18 are amended to read:

Amend Sec. 2, page 6, line 16, by striking out "2" and inserting; 4

Amend Sec. 3, page 14, line 4, by striking out "3" and inserting; 5

Amend Sec. 4, page 14, line 9, by striking out "4" and inserting; 6

Amend Sec. 5, page 14, line 18, by striking out "5" and inserting; 7

On the question,

Will the Senate agree to the amendment?

Senator SALVATORE. Mr. President, this amendment is the same amendment that was in House Bill No. 1130 which the Governor vetoed concerning a district attorney standing and the rights of a district attorney in litigation involving prisoners.

Senator ZEMPRELLI. Mr. President, would the gentleman from Philadelphia, Senator Salvatore, agree to a short interrogation?

The PRESIDENT pro tempore. Will the gentleman from Philadelphia, Senator Salvatore, permit himself to be interrogated?

Senator SALVATORE. I will, Mr. President.

Senator ZEMPRELLI. Mr. President, I understand this amendment is designed to allow the district attorney and the automatic standing in matters that involve prisoners and prisoner litigation. Is that correct?

Senator SALVATORE. Yes, Mr. President.

Senator ZEMPRELLI. Mr. President, does the gentleman know whether or not the language of this amendment is included in the House amendments that were made to, I think it is, Senate Bill No. 1130?

Senator SALVATROE. Yes, Mr. President, it is identical.

And the question recurring,

Will the Senate agree to the amendment?

The yeas and nays were required by Senator SALVATORE and were as follows, viz:

YEAS – 37

Andrezeski	Holl	Musto	Shaffer
Armstrong	Hopper	O'Pake	Shumaker
Bell	Jubelirer	Peterson	Stapleton
Brightbill	Lemmond	Reibman	Stauffer
Corman	Lewis	Rhoades	Stewart
Fisher	Lincoln	Rocks	Stout
Greenleaf	Loeper	Romanelli	Tilghman
Greenwood	Madigan	Ross	Wenger
Helfrick	Moore	Salvatore	Wilt
Hess			

NAYS – 11

Afflerbach	Jones	Mellow	Williams
Bodack	Kelley	Regoli	Zemprelli
Fumo	Lynch	Scanlon	

A majority of the Senators having voted "aye," the question was determined in the affirmative.

Supreme Court, U.S.
FILED
MAR 13 1992
OFFICE OF THE CLERK

NO. 91-1236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LYNNE ABRAHAM,
Petitioner
v.

MARTIN HARRIS, et al.,
Respondents

Reply Brief to Respondents' Brief in Opposition to Petition for Certiorari

REPLY BRIEF FOR PETITIONER

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IN THE
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OCTOBER TERM, 1991

LYNNE ABRAHAM,
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v.

MARTIN HARRIS, et al.,
Respondents

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents imply that the Philadelphia prison conditions are unconstitutional. On the contrary, there has never been pre-trial discovery, a trial, or any findings or concessions of unconstitutionality in this litigation. In the related state court litigation, the findings of unconstitutionality were invalidated by the

Pennsylvania Supreme Court. See Jackson v. Hendrick, 503 A.2d 400 (Pa. 1986).

SUPPLEMENTAL ARGUMENT

I. PETITIONER FULLY AND FAIRLY PRESENTED IN THE LOWER COURTS THE ARGUMENTS RAISED IN THE CERTIORARI PETITION.

Respondents claim that petitioner waived the first argument in her certiorari petition because she allegedly did not raise it in the Third Circuit Court of Appeals. Respondents contend that petitioner failed to argue below that Pennsylvania had the right to designate the District Attorney to represent the Commonwealth's interests. Respondents specifically assert that petitioner failed to "characterize" the state statute in this manner,[1] and that the Third Circuit thus did not address this issue. On the

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[1]Brief of Respondents in Opposition to Petition for Writ of Certiorari at i.

contrary, petitioner squarely presented this argument in the lower court.

Respondents' argument essentially boils down to a quibble over whether one must use the identical words in the court below. Specifically, respondents complain that petitioner used the word "grant" rather than the words "delegate" or "designate" to describe Pennsylvania's actions in conferring an interest on the District Attorney. Here, petitioner's argument that the state granted a public official the right to compel institutional custody of prisoners necessarily presumes that the state had the power to grant this right in the first place.

When the District Attorney originally sought to intervene in this case, none of the parties contested, and the Third Circuit held, that under Pennsylvania law the District Attorney was responsible for representing the Commonwealth's interest

in the enforcement of its criminal laws.[2] The Third Circuit nonetheless denied intervention, holding that "[w]e must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials. But we decline to equate the District Attorney's function as the spokesperson for Pennsylvania's interest in criminal prosecutions with the responsibility for policing the entire criminal justice system."[3] Following the enactment of 18 Pa. Cons. Stat. Ann. § 1108, the District Attorney again sought to intervene on the basis that the Pennsylvania Legislature had now made it clear that the District Attorney's powers did indeed

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[2]See Harris v. Pernsley, 820 F.2d 590, 598 (3d Cir. 1987) (recognizing that the District Attorney has the power and the duty "to represent the Commonwealth's interests in the enforcement of its criminal laws") (quoting Commonwealth ex rel. Specter v. Bauer, 261 A.2d 573, 575 (Pa. 1970)).

[3]Harris v. Pernsley, 820 F.2d at 602.

include participation in prison litigation, and thus established an interest sufficient for intervention.

Following the denial of the second motion to intervene, petitioner appealed to the Third Circuit. In her brief, petitioner again contended, as in the District Court, that the Pennsylvania Legislature had granted the District Attorney an interest sufficient for intervention.[4] Petitioner maintained that the District Attorney had the duty under Pennsylvania law "to represent the Commonwealth's interests in enforcing criminal laws,"[5] and that pursuant to the enactment of § 1108 the District Attorney was the only public

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[4]See Third Circuit Brief for Appellant, Supp. App. at 13 ("The Pennsylvania Legislature clearly and emphatically granted the District Attorney state law rights and a legal interest directly relating to this prison litigation"); Supp. App. at 17 ("[T]he District Attorney has been granted substantial state law rights by the Commonwealth of Pennsylvania").

[5]See Supp. App. at 15.

official designated by the state to compel institutional custody of prisoners.[6] Petitioner further argued that the federal courts were bound to "respect the boundaries that the Commonwealth has chosen to draw for its public officials,"[7] and that "the Commonwealth has chosen to include within those boundaries for the District Attorney the right to seek to compel institutional custody of prisoners."[8]

Based upon these arguments, petitioner did not waive in the lower court the issue now presented to this Court. The argument that the state had the power to designate the District Attorney as the public

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[6] See Supp. App. at 21-22 ("The District Attorney is the only official granted the right to seek to compel institutional custody of county prisoners. A Pennsylvania court has determined that pursuant to § 1108 a District Attorney is entitled to compel government officials to provide custodial facilities.").

[7] See Supp. App. at 22 (quoting opinion in Harris v. Pernsley, 820 F.2d at 602).

[8] See Supp. App. at 22.

official to compel institutional custody of prisoners necessarily presumes that the state had the power to delegate this function in the first place.

Simply because the certiorari petition now uses language not employed in presenting the argument below, does not mean that the argument has been waived. A petitioner is not required to file a certiorari petition that is a verbatim recitation of the appellate brief filed in the court of appeals. On the contrary, the practice and procedure of this Court necessarily requires that the certiorari petition have a special focus; the petition must demonstrate cert worthiness by advising this Court that a conflict exists with another appellate court, that the question presented is sufficiently important for Supreme Court review, or that the decision below calls for the exercise of this

Court's supervisory powers.[9] These certiorari considerations are necessarily not appropriate for an appellate brief in the court of appeals.

The record establishes that the issues presented in the certiorari petition were fully and fairly presented in the Court of Appeals. The Third Circuit's opinion, and the dissenting opinion of Judge Aldisert, squarely address the issue of whether Pennsylvania had the right designate the District Attorney as the public official to challenge the consent decrees in this prison litigation. This Court should therefore grant review.

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[9] See generally Stern, Gressman, and Shapiro, Supreme Court Practice (6th Ed. 1986), § 6.31.

II. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY WHERE THERE HAS BEEN A CLEAR-CUT STATUTORY CHANGE IN STATE LAW.

Respondents also claim that the law of the case doctrine precludes granting relief to petitioner and that this case is therefore inappropriate for review. This claim is meritless.

In the Third Circuit's original opinion, that court denied the District Attorney the right to intervene based upon its interpretation of Pennsylvania law concerning the duties of the District Attorney.[10] Subsequent to this decision, the Pennsylvania Legislature chose to delegate to the District Attorney the right to participate in prison litigation and compel the institutional custody of prisoners.

The state law upon which the Third Circuit relied thus changed dramatically upon the enactment of § 1108. Because

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[10] See Harris v. Pernsley, 820 F.2d at 597.

there has been a supervening change of law, the law of the case doctrine should not be applied. See Schultz v. Onan Corp., 737 F.2d 339, 345 (3d Cir. 1984); Amen v. City of Dearborn, 718 F.2d 789, 794 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984); Shannon v. United States Department of Housing and Urban Development, 433 F. Supp. 249, 251 (E.D. Pa. 1977); see Ratay v. Lincoln National Life Insurance Co., 405 F.2d 286, 288 (3d Cir. 1968). See generally Arizona v. California, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 1391 n.8 (1983) ("law of the case" should not be applied where it is clearly erroneous and would work a manifest injustice); Quern v. Jordan, 440 U.S. 332, 347 n.18, 99 S. Ct. 1139, 1148 n.18 (1979) ("law of the case" does not apply to issues not previously determined).

III. THE THIRD CIRCUIT'S NEW INTERVENTION STANDARD WARRANTS REVIEW.

Respondents do not contest that the Third Circuit's opinion required a proposed intervenor to establish that she could have been a party to the underlying litigation. Rather, respondents contend that because the opinion did not expressly adopt a new standard for intervention, Supreme Court review is unwarranted. This argument is meritless.

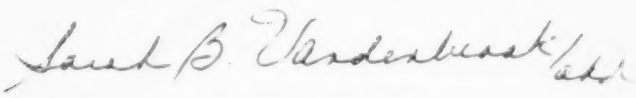
Where, as here, the court uses new standards to analyze an intervention motion, the court necessarily is adopting those standards as the test for intervention. The fact that it does not expressly label this new standard as such does not mean that it does not exist. Here, the Third Circuit has clearly required a proposed intervenor to establish that she could have been a party to the underlying litigation. This requirement is contrary

to this Court's authority, Fed. R. Civ. P. 24, and the cases from other appellate courts. This Court should for this additional reason grant review.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, this Court should issue a writ of certiorari to review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,



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